SUPREME COURT, U. S.

OCT 17 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-941

ELIZABETH HOLTZMAN, individually and in her capacity as a member of the United States House of Representatives; 1ST LT. ARTHUR WATSON, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN JAMES H. STRAIN, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN MICHAEL FLUGGER, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; and CAPTAIN DONALD E. DAWSON, 307th Strategic Wing, United States Air Force, U-Tapao, Thailand,

Petitioners,

—against—

JAMES R. SCHLESINGER, individually and as Secretary of Defense; JOHN L. MCLUCAS, individually and as Secretary of the Air Force; and WILLIAM P. CLEMENTS, individually and as Deputy Secretary of Defense,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a petition for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on August 8, 1973, reversing the determination of the District Court,

dated July 25, 1973, that the Executive lacked constitutional authorization to commit American forces to combat in and over Cambodia.

Opinions Below

The majority and dissenting opinions of the Second Circuit reversing the decision of the District Court are reported at 484 F.2d 1307 and are set forth in the Appendix, *infra*, at pp. 1a-25a. The order of the Second Circuit denying rehearing in banc (Oakes, J., dissenting) is not officially reported and is set forth in the Appendix, *infra*, at p. 27a. The decision of the United States District Court for the Eastern District of New York (Judd, J.), ruling that the Executive lacked constitutional authority to order petitioners to bomb Cambodia is reported at 361 F. Supp. 544 and 361 F. Supp. 553 and is set forth in the Appendix, *infra*, at pp. 28a-71a. The opinion of Mr. Justice Marshall declining to vacate the stay of the District Court's order is reported at —— U.S. ——, 38 L. Ed.2d 18 and is set forth in the Appendix at pp. 72a-84a. The opinion of Mr. Justice Douglas vacating the stay of the District Court's order is reported at —— U.S. ——, 38 L. Ed.2d 28, and is set forth in the Appendix at pp. 85a-89a. The order of Mr. Justice Marshall staying the order of the District Court and Mr. Justice Douglas' dissent therefrom are reported at —— U.S. ——, 38 L. Ed.2d 33, and are set forth in the Appendix at pp. 90a-96a. The orders of the Chief Justice denying petitioners' applications for an extraordinary session of the Court are unreported and set forth in the Appendix at pp. 96a-97a.

Jurisdiction

The judgment of the Court of Appeals was entered on August 8, 1973 [A 1a]. A timely petition for rehearing in banc was denied by the Second Circuit on September 17, 1973 [A 26a-27a]. This Court has jurisdiction to entertain this petition under 28 U.S.C. §1254(1).

Questions Presented

1. Were the orders issued by the Executive branch to petitioners, directing them to engage in the combat bombing of Cambodia in May and June, 1973, constitutionally authorized within the meaning of Article I, Section 8, Clause 11 of the Constitution?

2. Did the Executive branch possess authority to order American forces to engage in combat operations in or over Cambodia in the absence of Congressional authorization?

3. Did Congress authorize the commitment of American forces to combat in Cambodia within the meaning of Article I, Section 8 of the Constitution?

4. Do petitioners possess standing to challenge the constitutionality of orders directing American forces to engage in combat activities in Cambodia?

5. Is judicial review of the constitutionality of orders directing petitioners to engage in combat in Cambodia precluded by the political question doctrine?

6. Is this proceeding moot despite the pendency of court martial charges against a petitioner who refused to obey orders to bomb Cambodia?

Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 11 of the Constitution.

Statement of the Case

Petitioners, Captain Donald Dawson, Lt. Arthur Watson, Captain James H. Strain and Captain Michael Flugger, were B-52 bomber crewmen assigned to Air Force combat units who declined to engage in the bombing of Cambodia during May and June of 1973.

Petitioner, Elizabeth Holtzman, is a member of the United States House of Representatives from the 16th Congressional District of New York who challenged the authority of the Executive branch to commit American forces to combat in Cambodia in the absence of Congressional authorization.

Congresswoman Holtzman commenced this action in April, 1973. While the District Court pondered procedural aspects of the case, Captain Strain, Captain Flugger, Lt. Watson and Captain Dawson joined Congresswoman Holtzman in challenging the constitutionality of orders directing them to bomb Cambodia [A 42a-43a; 71a].

Upon announcing their intention to challenge the legality of orders directing them to bomb Cambodia, Captain Strain, Captain Flugger and Lt. Watson were immediately declared unfit for flight duty and returned to the United States to undergo psychiatric evaluation. Lt. Watson has been permitted to resign from the Air Force.[1] Captain

[1] Lt. Watson's resignation carries with it an unsatisfactory efficiency rating attributable not to his combat performance, which all concede was exemplary, but solely to his refusal to bomb Cambodia.

Strain and Captain Flugger have remained in the Air Force, but continue to be barred from flight duty and professional advancement solely because they refused to bomb Cambodia in the absence of Congressional authorization.

Captain Dawson's refusal to bomb Cambodia was met with a more drastic response. He was charged with failure to obey a lawful order to bomb Cambodia and is currently assigned to Clark Air Force Base in the Philippines awaiting trial by General Court Martial.[2]

As Mr. Justice Marshall has already noted herein [A 73a], the basic facts underlying this controversy are matters of public record and have been exhaustively canvassed by Judge Judd in his District Court opinion [A 45a-71a].

Prior to April 30, 1970, the Executive branch repeatedly assured both the Congress and the American people that the United States was not engaged in combat activities in or over Cambodia. As Mr. Justice Marshall and Judge Oakes noted, however, the Executive's pre-April 30, 1970 disclaimers were pursuant to a systematic plan of deception designed to conceal covert American combat operations in Cambodia from Congress and the American people.[3]

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[2] Convocation of Captain Dawson's court martial has been delayed pending a decision on his application for discharge as a conscientious objector. To date, the application has been denied by several levels of Air Force authority. Final review by the Secretary of the Air Force has not been completed.

[3] Indeed, the Air Force falsified its internal records in order to conceal the scope and nature of American combat activity in Cambodia. The falsified records were inadvertently submitted to Judge Judd by the United States Attorney, acting in the best of faith. When the falsification became known, the false figures were replaced with new data which, we are assured, accurately reflect United States combat activity in Cambodia.

On April 30, 1970, the Executive ordered American forces "to clean out major enemy sanctuaries on the Cambodian-Vietnam border." 6 *Presidential Documents of Richard Nixon,* 596, 598 (1970). In response to widespread attacks upon the power of the Executive to order American forces to combat in Cambodia in the absence of Congressional authorization, then Deputy Attorney General William Rehnquist argued that the lawful presence of American forces in Vietnam[4] created penumbral constitutional authority in the President, as Commander-in-Chief, to take steps to protect the lives of Americans fighting in Vietnam. See generally, Rehnquist, *The Constitutional Issues—Administration Position,* 45 NYU Law Rev. 628 (1970); *Public Papers of the Presidents, Richard Nixon,* 1970, pp. 405-410; 476-480; 529-541 (G.P.O. 1971); Stevenson, *United States Military Action in Cambodia: Questions of Inter-*

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[4] The legality of the commitment of American combat forces to Vietnam in the absence of explicit Congressional authorization is itself a highly doubtful proposition. Although several courts have found sufficient Congressional authorization of the Vietnam war in the passage of military appropriations bills, petitioners earnestly believe that such a view of the war powers clause renders it a virtual nullity. Petitioners agree with the observation of Judges Wyzanski and Bazelon in *Mitchell* v. *Laird,* —— F.2d —— (D.C. Cir. 1973), that a vote on a collateral appropriation bill cannot provide the explicit and formal Congressional action required by Article I, Section 8, clause 11. The issue is discussed at length in the petition of certiorari lodged with this Court in *Orlando* v. *Laird,* 443 F.2d 1039 (2nd Cir.) cert. denied, 404 U.S. 869 (1971) and *Da Costa* v. *Laird,* 448 F.2d 1368 (2nd Cir. 1971) cert. denied, 405 U.S. 979 (1972) respectively. However, whatever the effect of appropriations bills on the use of force in Vietnam, no similar authorization existed for the use of American forces in Cambodia.

In view of the apparently active participation by Mr. Justice Rehnquist in the formulation and enunciation of the Executive's legal position, petitioners have filed a motion requesting him to recuse himself from participation in this case.

national Law, reprinted in 3 The Vietnam War and International Law (Falk ed. 1972).

In the period after April 30, 1970, the Executive consistently espoused the "penumbral power" doctrine and justified its sporadic use of combat forces in Cambodia solely as necessary to protect the lives of American soldiers deployed in Vietnam. Thus, on June 3, 1970, President Nixon stated:

> "The only remaining American activity in Cambodia after July 1 [1970] will be air missions to interdict the movement of enemy troops and material *where I find that it is necessary to protect the lives and security of our men in South Vietnam.*" *Public Papers of the Presidents, Richard M. Nixon, 1970*, p. 478 (G.P.O. 1971). (Emphasis added)

Again, on June 30, 1970, President Nixon stated:

> "We will conduct—with the approval of the Cambodian Government—air interdiction missions against the enemy efforts to move supplies and personnel through Cambodia toward South Vietnam to reestablish base areas relevant to the war in Vietnam. *We do this to protect our forces in South Vietnam. Public Papers of the Presidents, Richard M. Nixon, 1970*, p. 538 (G.P.O. 1971) (emphasis added).

Finally, on July 1, 1970, President Nixon stated:

> "I'm going to use, as I should, the air power of the United States to interdict all flows of men and supplies which I consider are directed toward South Vietnam. *That is my role in defending American men.*" Ibid., p. 552 (emphasis added).

See also, *Public Papers of the Presidents, Richard M. Nixon*, 1971, pp. 265, 449-50 (G.P.O. 1972); Testimony of Secretary of State William P. Rogers, Hearings before the Committee on Foreign Relations, United States Senate, 92nd Cong., 1st Sess. p. 508 (1971).

On April 1, 1973, the last American soldier was withdrawn from South Vietnam. Since American military activity in Cambodia had been justified solely as necessary to protect American forces in South Vietnam, the withdrawal of American forces from South Vietnam on April 1, 1973 deprived the Executive of the only legal basis which it had ever asserted for the use of American combat forces in Cambodia. Deprived of the only legal basis which it had ever asserted for ordering American forces to Cambodia, the Executive embarked on a search for a new legal "handle" which would permit it to continue the vastly intensified bombing of Cambodia.

On July 25, 1973, Judge Judd ruled that no Congressional authorization existed for the commitment of American forces to combat in Cambodia [A 44a-71a]. On July 27, 1973, a panel of the Second Circuit stayed Judge Judd's decision pending review on the merits. On August 1, 1973, Mr. Justice Marshall declined to vacate the Second Circuit's stay [A 72a-84a]. On August 4, 1973, Mr. Justice Douglas vacated the Second Circuit's stay and reinstated Judge Judd's injunction [A 85a-89a]. On August 4, 1973, Mr. Justice Marshall issued a superseding order staying Judge Judd's injunction pending appeal [A 90a]. On August 6, 1973, the five available active judges of the Second Circuit denied petitioners' application to hear the appeal

from Judge Judd's order in banc.[5] On August 8, 1973, a divided panel of the Second Circuit, consisting of Judges Oakes, Mulligan and Timbers, reversed Judge Judd's determination,[6] ruling that petitioners lacked standing [A 17a-19a]; that judicial review of the legality of orders to bomb Cambodia was barred by the political question doctrine [A 4a-12a]; and that Congress had, in directing the Executive to terminate the bombing of Cambodia no later than August 15, 1973, impliedly authorized hostilities until that date [A 13a-17a]. On August 9 and 10, 1973, petitioners' applications to the Chief Justice for an extraordinary sitting of this Court were denied [A 96a-97a].

Six Federal judges have expressed an opinion on the merits of this controversy: Judge Judd and Judge Oakes have sustained petitioners' position; Mr. Justice Marshall and Mr. Justice Douglas have indicated sympathy for petitioners' position. Only two of the six, Judges Mulligan and Timbers, have rejected it. In view of the extraordinary importance of both the substantive and procedural issues raised herein and in view of the fact that the views espoused by a majority of the panel below have commanded the support of only two of the six judges who have spoken in this case, final resolution of the matter by this Court seems particularly appropriate.

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[5] Judge Mulligan, in his majority opinion, suggests that the denial of in banc status was designed to expedite the appellate process [A 4a].

[6] Judge Mulligan wrote for the majority. Judge Oakes dissented.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision of the majority below, upholding the legality of orders directing petitioners to bomb Cambodia, incorrectly resolved an issue of critical national significance and established a potentially disastrous precedent validating unilateral executive warmaking.

Captain Donald Dawson is facing a General Court Martial for declining to bomb Cambodia on June 21, 1973. His colleagues, Lt. Watson, Captain Flugger and Captain Strain, have either resigned from the service or been indefinitely grounded because they sought to challenge the legality of orders directing them to bomb Cambodia. In refusing to declare petitioners' orders unlawful, the majority below refused to be bound by the law which had painfully evolved from litigation questioning the legality of the Vietnam war and, instead, virtually abdicated all judicial responsibility for the enforcement of a critical provision of the Constitution.[7]

Although litigation concerning the constitutionality of the commitment of American forces to combat in Vietnam has been voluminous[8] (and divided on many questions), several basic principles have emerged clearly, and have varied hardly at all from those initially enunciated by

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[7] Judge Judd, in his opinion, applied precisely the standards which he had utilized three years earlier to uphold the legality of the commitment of American forces to combat in South Vietnam. *Berk* v. *Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970).

[8] The cases are collected below. 484 F.2d at 1312 n. 3 [A 12a-13a].

Judges Judd and Dooling in their pioneer efforts in *Berk* v. *Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970) and *Orlando* v. *Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970).

First, prior to the decision below, our courts had been virtually unanimous in holding that "[h]istory makes clear that Congressional power 'to declare war' conferred by Article I, Section 8 of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative . . ." *Berk* v. *Laird*, 429 F.2d 305 (2nd Cir. 1970) at 305.[9]

Second, our courts had ruled that the Executive lacked unilateral power to commit American forces to combat in the absence of Congressional authorization or ratification. E.g. *Orlando* v. *Laird*, 443 F.2d 1039, 1042 (2nd Cir. 1971) cert. denied, 404 U.S. 869 (1971).

Third, three circuits had ruled that while the form utilized by the legislature to express its authorization of combat activities is solely within the discretion of Congress, the judiciary may—and should—determine whether Congress has—in fact—authorized the Executive to order Americans into combat. E.g. *Massachusets* v. *Laird*, 451 F.2d 26 (1st Cir. 1971); *Orlando* v. *Laird, supra; Da Costa* v. *Laird*, 448 F.2d 1368 (2nd Cir. 1971) cert. denied, 405

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[9] Modern scholarship has, likewise, been virtually unanimous in recognizing that the grant of the war power to Congress was designed to limit the power of the Executive to engage the nation unilaterally in hostilities. E.g., Berger, *War Making by the President*, 121 U. of Pa. L. Rev. 29 (1972); Wormuth, *The Nixon Theory of the War Powers: A Critique*, 60 Cal. L. Rev. 623 (1972); Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 Yale L. Jour. 672 (1972).

U.S. 979 (1972); *Perkins* v. *Laird*, —— F.2d —— (8th Cir. 1970) cert. denied, 405 U.S. 965 (1972).[10]

Finally, our courts have recognized that when the Legislature and Executive branches are in open conflict concerning the waging of war, it is the duty of the judiciary to enforce the Constitution against a recalcitrant Executive. E.g. *Berk* v. *Laird*, 429 F.2d 302 (2nd Cir. 1970) at 305; *Orlando* v. *Laird*, 443 F.2d 1039 (2nd Cir. 1971) at 1042; *Massachusetts* v. *Laird*, 451 F.2d 26 (1st Cir. 1971) at 34; *Da Costa* v. *Laird*, 448 F.2d 1368 (2nd Cir. 1971) at 1370; *Da Costa* v. *Laird*, 471 F.2d 1146 (2nd Cir. 1973) at 1156.

Unfortunately, in declining to affirm Judge Judd, the majority below upheld the legality of military combat orders issued in the absence of a shred of Congressional authorization and reiterated in the teeth of formal and explicit Congressional opposition. Unless corrected, the erroneous refusal of the majority below to perform its constitutional duty will stand as a dangerous invitation to Executive intransigence. As Mr. Justice Frankfurter cautioned twenty-one years ago, in words which have acquired even more signficance with the passage of a generation:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the genera-

[10] Petitioners believe that Article I, Section 8 requires that Congress authorize the commitment of American forces to combat in a formal, explicit and unambiguous manner. Accordingly, while petitioners are in basic agreement with many of the legal principles articulated in *Orlando* v. *Laird*, *supra*, and its progeny, petitioners disagree with so much of those opinions as permit Congress to authorize a war by implication by enacting collateral measures. Petitioners believe that it is not too much to ask that decisions of the magnitude of authorizing armed hostilities be taken with the formality and explicitness which would be required of a private party contracting for the purchase of a parcel of real estate or making a will. Cf. *Mitchell* v. *Laird*, —— F.2d —— (D.C. Cir. 1973) (per Bazelon and Wyzanski, JJ.).

> tive force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority. *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J. concurring).

If we are to prevent the "accretion of dangerous power" which would flow from the judicial validation of the procedures utilized by the Executive in ordering petitioners to bomb Cambodia, the decision of the majority below must be set aside.

1. Congress Neither Authorized Nor Ratified the Orders Directing Petitioners to Bomb Cambodia.

Judge Mulligan ruled below that Congress, in forbidding the Executive to bomb Cambodia after August 15, 1973[11] had impliedly—and unwittingly—ratified and authorized the bombing of Cambodia up to that date. However, a review of Congressional activity indicates that Congress, far from authorizing or ratifying the bombing of Cambodia, repeatedly, explicitly and formally declined to do so and took every step available to it to terminate the Executive's unilateral commitment of forces to combat.

On May 10, 1973, the House of Representatives declined by a vote of 219-188 to authorize the Executive to transfer funds to the Pentagon's Cambodian account to pay for the bombing of Cambodia.[12]

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[11] PL 93-52; PL 93-50.

[12] Having suffered this rebuff in the House, the Pentagon suddenly discovered that it did not really need the transfer authority to bomb Cambodia and never renewed its request. Of course, the failure to obtain transfer authority did not prevent the Pentagon from continuing the bombing unabated.

Moreover, on May 10, 1973, the House of Representatives, by a vote of 224-188, adopted an amendment proposed by Representative Long of Maryland, which provided:

> "None of the funds herein appropriated to the Department of Defense under this Act shall be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia by United States forces."

The debate surrounding the adoption by the House of the Long Amendment clearly reveals the hostility with which the Cambodian bombing was viewed. See generally, Cong. Rec. May 10, 1973, pp. H3558-H3598 (daily ed.).

On May 31, 1973, the Senate, by a vote of 63-19, adopted an amendment proposed by Senator Eagleton which provided:

> "Notwithstanding any other provision of law, no funds herein, heretofore or hereafter appropriated may be obligated or expended to finance the involvement of United States military forces in hostilities in or over or from off the shores of Laos or Cambodia."

Although the tenor of the House and Senate amendments were similar, since the Senate version was more stringent, the differing provisions were sent to a Senate-House Conference Committee. The Senate conferees insisted upon the stringent Eagleton Amendment, while the House conferees, led by Representative Mahon, who made no secret of his opposition to any restraints on American military activities in Cambodia, refused to accede. Finally, on June

25, 1973, the House of Representatives voted 235-172 to accept the Eagleton Amendment. The Second Supplemental Appropriations Act of 1973, containing the Eagleton Amendment, was accepted by the Senate on June 26, 1973, by a vote of 81-11, and sent to the President for his signature. However, on June 27, 1973, President Nixon, in an unprecedented refusal to accede to the will of Congress in refusing to authorize military activity, vetoed the Second Supplemental Appropriations Act of 1973 because he found the restraints upon his military activities unacceptable.[13]

On June 27, 1973, the House of Representatives voted 240-175 to override the veto, but fell 35 votes short of the required ⅔ majority.

Faced with (a) the certainty of a Presidential veto of any bill containing the Eagleton Amendment and (b) the critical necessity of enacting general governmental funding legislation prior to the expiration of the fiscal year on June 30, 1973, Congress sought to walk a constitutional tightrope. On the one hand Congress wished to enact the desperately needed 1973-1974 general governmental funding bills, but on the other hand Congress wished to avoid the pitfall (created in part by the analysis in *Orlando*) of unwillingly authorizing the President's use of force in Cambodia by appropriating money for the war's prosecu-

[13] A serious question exists as to whether the President may veto an exercise of Congress' independent constitutional responsibilities under Article I, Section 8. However, since, despite the veto, no Congressional authorization for the Cambodian bombing exists, it is unnecessary to explore the legality of the President's purported veto. Since it is the President's inertial responsibility under Article I, Section 8 to induce a majority of Congress to affirmatively authorize a war, it is difficult to understand how the President can veto the expression of a majority of both Houses explicitly forbidding him from engaging in a given war.

tion. Congress solved its dilemma by re-enacting general funding legislation containing the Eagleton Amendment expressing its unequivocal opposition to the bombing of Cambodia but deferring the mandatory cut-off of Cambodian funds until August 15, 1973, upon extracting a promise from the President that he would not veto such a bill. President Nixon, thereupon, signed the desperately needed general funding bills on June 30, 1973 with the Eagleton Amendments as modified.[14]

The Executive now argues that Congress, in deferring the date of the cut-off of funds in the Eagleton Amendment until August 15, 1973, in order to avoid a threatened Presidential veto, unwittingly authorized and ratified the Executive's use of force in Cambodia. However, it is absurd to contend that Congress, having been frustrated by an unprecedented Presidential veto in its efforts to cut-off all funds for Cambodia, authorized or approved the use of force in Cambodia merely because, in the words of Senator McGovern, it embarked upon a "tactical effort to get the best possible veto-proof solution." Cong. Rec. June 29, 1973, p. S12561 (daily ed.).

Senator Fulbright, perhaps the Senate's most implacable foe of American military operations in Vietnam, Laos and Cambodia, was the principal architect of the "veto-proof solution" which the government now contends acts as a

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[14] Thus, the final text of the Eagleton Amendment, attached to the continuing resolution, provides:

> "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." Pub. Law 93-52.

back door approval of the Cambodian bombing. In explaining his support of the modified Eagleton Amendment, Senator Fulbright stated:

> "The acceptance of an August 15 cut-off date should in no way be interpreted as recognition by the [Senate Foreign Relations Committee] of the President's authority to engage U.S. forces in hostilities until that date. The view of most members of the committee has been and continues to be that the President does not have such authority in the absence of specific Congressional approval." Cong. Rec. June 29, 1973, p. S12560 (daily ed.).
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> * * * * *
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> "The acceptance of an August 15 cutoff date should in no way be interpreted as recognition by the Committee of the President's authority to engage United States forces in hostilities until that date." *Id.* at S12562.

During the extensive debate on the modified Eagleton Amendment not a single member of the Senate suggested that its passage was intended to bestow any authority on the Executive to bomb Cambodia. Rather, no fewer than 23 Senators[15] explicitly asserted that the passage of the modified Eagleton Amendment could not authorize the

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[15] Fulbright, Javits, McGovern, Eagleton, Mansfield, Hatfield, Kennedy, Bayh, Stevenson, McIntyre, Church, Haskell, Humphrey, Hallings, Muskie, Mathias, Nelson, Hartke, Pastore, Mondale, Moss, Cranston and Symington. Senators Eagleton, Bayh and Muskie expressed the fear that the Executive would attempt to misuse the enactment of the August 15 cut off as an implied authorization for the bombing. They were repeatedly assured, however, by the measure's sponsor that it did not grant any authority to the Executive, but merely sought to end his actions in Cambodia at the earliest "veto-proof" date.

President to engage in hostilities. As Senator Allen, hardly a Senate dove, noted:

> "The Amendment is not a grant of authority. It is a limitation on authority, and it will bring this war to a very definite halt." *Id.* at S12575.

It is, therefore, futile for the Executive to suggest that the modified Eagleton Amendment, designed to end the Cambodian bombing as quickly as Congress understood it possible to do so, had the unintended effect of establishing a fictitious Congressional assent to the war in Cambodia.

As Judge Judd noted below:

> "It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized" [A 69a].

Unless this Court affirms Judge Judd, the President will be empowered to commit American forces to combat over the objections of the Congress and to continue his military policies so long as he can persuade one-third of either House to sustain his veto. Such a procedure, permitting the American President far more power than the British sovereign, is a far cry from the hopes of the Founding Fathers when they sought by the war powers clause to establish Congress as the ultimate arbiter of war and peace.

The majority below appeared to assume that it remains constitutional for the Executive to commit American forces

to combat unilaterally so long as ⅔ of both Houses of Congress do not order him to stop. However, the inertial burden under Article I, Section 8, clause 11, does not lie with Congress to marshal veto-proof majorities in both Houses to prevent the President from waging war; rather, the inertial burden lies with the President to secure the approval of a majority of both Houses as a pre-condition to the waging of war. Whether or not Congress was able to express its opposition to the commitment of American forces to combat in Cambodia by veto-proof majorities, it remains clear that the President failed in his inertial burden of persuading majorities of both Houses to grant him Constitutional authorization to wage war in Cambodia.

2. No Procedural Obstacle Exists to Judicial Review of the Legality of the Orders Directing Petitioners to Bomb Cambodia.

A. *Standing*

The majority below ruled that the Air Force petitioners lacked standing to challenge the legality of orders directing them to bomb Cambodia because the Air Force had removed them from combat status [A 17a-19a]. However, such a wooden application of the standing doctrine is wholly at variance with the decisions of this Court, e.g. *United States* v. *SCRAP*, —— U.S. —— (1973),[16] and establishes a blueprint for evasion permitting the military to frustrate judicial review merely by reassigning dissenters. Cf. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

The majority's refusal to recognize the Air Force petitioners' standing ignores the vital and continuing personal

[16] In fact, such an application confuses standing with mootness.

stake which each maintains in this controversy. In declining to recognize Captain Dawson's standing, the majority was without judicial sanction. Captain Dawson is awaiting General Court Martial for declining to comply with the orders to bomb Cambodia at issue herein. To refuse to recognize such a "stake" in the outcome of this litigation as sufficient to satisfy "standing" is to reduce the concept to a meaningless *post hoc* label. Compare, *United States* v. *SCRAP*, —— U.S. —— (1973).[17]

B. *Mootness*

It will doubtless be argued that this case is moot in view of the cessation of American bombing of Cambodia on August 14, 1973. However, the legality of the orders directing petitioners to bomb Cambodia remains a live issue generating dramatic practical consequences for each petitioner. E.g. *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Carroll* v. *President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968); *Bank of Marin* v. *England*, 385 U.S. 99 (1966). See also, *St. Pierre* v. *United States*, 319 U.S. 41 (1943); *Sibron* v. *New York*, 392 U.S. 40 (1968).

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[17] The stake which Captain Strain and Captain Flugger retain in this controversy is nothing less than the preservation of their Air Force careers. Each has been indefinitely grounded for challenging the legality of their orders and can salvage their careers only by establishing that they were justified in questioning the power of the Executive to order them to bomb Cambodia in the absence of Congressional authorization. Captain Strain has already been passed over for promotion as a consequence of this challenge to his orders. Lt. Watson has resigned from the Air Force as a direct consequence of his refusal to bomb Cambodia. His resignation carried with it an unsatisfactory performance rating attributable solely to his contention that his Cambodian orders were unlawful.

The most clearly defined "collateral consequence" herein attaches to Captain Donald Dawson. Captain Dawson declined to bomb Cambodia on June 21, 1973 and is now facing a General Court Martial. However, if Congress did not authorize the commitment of American forces to combat in Cambodia, Captain Dawson's refusal to bomb Cambodia cannot subject him to court martial. Thus, in the most literal sense, the issue of whether Captain Dawson will be the last American casualty in Southeast Asia turns on the outcome of this proceeding.[18]

C. *Political Question*

The majority below ruled that judicial review of the legality of petitioners' orders was barred by the political question doctrine [A 4a-12a]. While several courts have ruled that the political question doctrine precludes judicial review of the procedures utilized by Congress in exercising its power under Article I, Section 8, clause 11, no court has suggested that the judiciary is totally powerless to restrain the Executive from committing American forces to combat in the teeth of Congressional opposition.

Petitioners do not ask this Court to substitute its judgment for the judgment of the Executive as to the wisdom,

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[18] The collateral consequences attaching to the remaining Air Force petitioners are described *supra* at p. 20 n. 17. The recent enactment of the War Powers Act, PL 93-148, while helpful in resolving certain issues, does not purport to speak to the constitutional power of the Executive to order forces into combat in the absence of explicit Congressional authorization. While the War Powers Act places welcome restraints upon unilateral Executive warmaking of extended duration, it does not purport to deal with the critical question raised herein of the President's initial power to order American forces into combat. Moreover, since the orders to petitioners were issued prior to the passage of the Act, the legality of the order directed to Captain Dawson remains unaffected by subsequent legislation.

propriety or morality of committing American forces to combat in Cambodia. However, just as this Court's power is circumscribed by the Constitution, so the power of the Executive to commit American forces to combat is subject to constitutional limitation. It is the gravamen of this case, not that the Executive was wrong about the wisdom of military activities in Cambodia, but that the political branch explicitly designated by Article I, Section 8, clause 11 of the Constitution to be the ultimate arbiter of war and peace has been ignored and repudiated by the Executive's unilateral commitment of American forces to combat in Cambodia. Thus, petitioners do not ask this Court to "second guess" the President, but merely to review whether the branch of government to which the war power has been textually committed by the Constitution has, in fact, authorized the commitment of American forces to Cambodia. In effect, petitioners ask this Court to do nothing more than assure conformity to constitutional norms of procedural conduct in the exercise of the most awesome power any nation can possess—the power to impose its will on others by armed force.

In *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), the Supreme Court ruled that President Truman had acted in excess of his constitutional powers in seizing the nation's steel mills to head off a threatened strike which he feared would hinder the Korean war effort. Mr. Justice Black, writing for the Court in *Youngstown,* phrased the issue and summarized the arguments of the parties as follows:

> "We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take

possession of and operate most of the nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States". 343 U.S. at 582.

The Court ruled in *Youngstown* that the determination whether to seize private property for public use was committed under Article I, Section 1 of the Constitution to the Congress—not the Executive—and that in the absence of express Congressional authorization, the President lacked constitutional authority to seize the private property in question.[19]

Petitioners' position bears a striking resemblance to those advanced by the plaintiffs in *Youngstown*. Paraphrasing Mr. Justice Black, this Court is asked to decide whether the President acted in excess of his constitutional power when he issued orders directing the Secretary of Defense to order American combat forces to engage in combat in Cambodia after the withdrawal of American combat forces from South Vietnam. Petitioners argue that the President's order amounts to Executive exercise

[19] As Mr. Justice Douglas has noted, surely the power to seize lives is no less subject to constitutional limitation than is the power to seize property [A 87a].

of the responsibilities explicitly vested in Congress by Article I, Section 8, Clause 11 of the Constitution. The Executive's position, drawn largely from the memorandum of Secretary of State Rogers, is that the President's order was made upon a determination by the President that the pursuit of a stable peace in Indochina required the use of American combat forces in Cambodia and that, in carrying out his Cambodian military policy, the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander-in-Chief of the Armed Forces.

However, just as the authority to seize private property for public use is an Article I, Section 1 Congressional power, so the decision as to whether to commit American forces to fight and perhaps die is ultimately reserved under Article I, Section 8, Clause 11, to Congress.[20] Accordingly, the Executive may seize neither steel mills nor human beings in order to prosecute combat activities in the absence of clear and explicit Congressional authorization. E.g. *Berk* v. *Laird*, 429 F.2d 302 (2nd Cir. 1970); *Orlando* v. *Laird*, 443 F.2d 1039 (2nd Cir. 1971), *cert. denied*, 404 U.S. 869 (1971).

Moreover, applying the identical set of "manageable standards" utilized by the *Youngstown* Court, this Court is equipped to ascertain whether adequate Congressional authorization exists to commit American forces to combat in Cambodia.

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[20] Indeed, the explicit grant of the war power to Congress by Article I, Section 8, Clause 11, is a more mandatory grant of authority to the legislature than was the undifferentiated grant of legislative power to Congress pursuant to Article I, Section 1 which was before the Court in *Youngstown*.

The first "manageable standard" utilized by the *Youngstown* Court to measure the existence or non-existence of Congressional authorization were negative expressions of Congressional will evidencing a desire to deny the Executive the power in question. Thus, the Court in *Youngstown* noted that the power to seize private property in order to avert labor unrest was considered and rejected by Congress in 1947. Mr. Justice Frankfurter noted, first, that the House in 1947 had explicitly rejected an amendment to the Taft-Hartley Act which would have authorized seizure and, second, that a Committee of the Senate had similarly rejected seizure legislation in 1947. 343 U.S. at 600-601; 602-603. See also, 343 U.S. 639 (Jackson, J., concurring); and 343 U.S. at 660 (Burton, J., concurring).

In the instant case, the negative Congressional expression concerning the commitment of American forces to Cambodia is infinitely stronger than the equivocal Congressional actions relied upon by the *Youngstown* Court.[21]

The second "manageable standard" utilized by the *Youngstown* Court was the inability of the Executive to point to a Congressional act which could fairly be said was intended to authorize the actions in question.

Similarly, the Executive in the instant case can point to no act of Congress from which affirmative authorization to bomb Cambodia may be fairly implied.

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[21] The negative expressions of Congress concerning the commitment of American forces to combat in Cambodia are discussed in detail *supra* at pp. 13-18. Briefly put, the House of Representatives repeatedly expressed its opposition to an American combat role in Cambodia. (May 10, 1973, 219-188; May 10, 1973, 224-172; June 25, 1973, 235-172; June 27, 1973, 241-173.) The Senate was no less explicit. (May 31, 1973, 63-19; June 26, 1973, 81-11; June 27, 1973, 67-29; June 27, 1973, 72-19.)

D. *Exhaustion of Military Remedies*

Respondents will doubtless contend that this Court lacks power to rule on the legality of orders directing petitioners to bomb Cambodia under traditional notions of exhaustion of military remedies. *Parisi* v. *Davidson,* 405 U.S. 34 (1972).

In *Parisi,* a serviceman was court martialed for refusing to obey an order directing him to embark for Vietnam. This Court ruled that a Federal Court was empowered to grant his application for a writ of habeas corpus as a conscientious objector despite the pendency of court martial proceedings.

In *Parisi,* as in the instant case, the military tribunals are not functionally equipped to deal with the serious and difficult constitutional questions raised by the plaintiffs. Cf. *Noyd* v. *Bond,* 395 U.S. 683 (1969) at 696 n. 8. The expertise of the military justice system simply does not extend to a determination of whether sufficient Congressional authorization for a war exists under Article I, Section 8. Only an Article III, civilian, court is equipped to render a determination on so difficult a constitutional issue. Indeed, it is highly problematic whether the military justice system is empowered to declare an order illegal under Article I, Section 8. *Parisi* v. *Davidson, supra* at 42-44. Accordingly, since the relief which Captain Dawson seeks is not "available to him with reasonable promptness and certainty through the machinery of the military judicial system . . . " this Court is free to grant appropriate relief. *Parisi* v. *Davidson, supra* at 41-42.[22]

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[22] The Court of Military Appeals has ruled that it lacks power to determine whether Congress has authorized military activity within the meaning of Article I, Section 8, clause 11. E.g., *United*

CONCLUSION

For the reason stated above, a writ of certiorari should issue herein.

December 15, 1973

Respectfully submitted,

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MELVIN L. WULF
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22 East 40th Street
New York, New York

Attorneys for Petitioners

Of Counsel:

MARVIN M. KARPATKIN
NORMAN SIEGAL

States v. *Johnson*, 38 CMR 44 (1967). Accordingly, it would be futile to require Captain Dawson to present his defenses to the Court of Military Appeals.

Moreover, the experience of Captain Howard Levy and Captain Dale Noyd, who as a consequence of being obliged to exhaust military remedies, were required to serve virtually their entire sentences prior to being permitted access to an Article III Court cannot be ignored. There is something radically wrong with a system of justice which required Captain Levy to serve 2½ years in prison before he was permitted access to the civilian court which vacated his conviction. *Levy* v. *Parker*, —— F.2d —— (3rd Cir. 1973), cert. granted, —— U.S. ——, 42 U.S.L.W. 3235 (Oct. 23, 1973). Certainly, Captain Dawson should not be compelled to risk prison *before* being permitted access to the only court system capable of assessing his defense.

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1132—September Term, 1972.

(Argued August 8, 1973 Decided August 8, 1973.)

Docket No. 73-2094

ELIZABETH HOLTZMAN, individually and in her capacity as a member of the United States House of Representatives; 1st LT. ARTHUR WATSON, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN MICHAEL FLUGGER, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN JAMES H. STRAIN, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; and CAPTAIN DONALD E. DAWSON, 307th Strategic Wing, United States Air Force, U-Tapo, Thailand,

Plaintiffs-Appellees,

—against—

JAMES R. SCHLESINGER, individually and as Secretary of Defense; JOHN L. MCLUCAS, individually and as Acting Secretary of the Air Force; and WILLIAM P. CLEMENTS, individually and as Deputy Secretary of Defense,

Defendants-Appellants.

Before:

MULLIGAN, OAKES and TIMBERS,
Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, declaring that there was no existing Congressional authority for bombing or ordering military forces into Cambodia, and permanently enjoining the defendants from further participating in military activities in or over Cambodia.

Reversed and remanded with instructions to dismiss the complaint.

BURT NEUBORNE, New York, New York (Leon Friedman, American Civil Liberties Union, New York, New York; Norman Siegel and Paul Chevigny, New York Civil Liberties Union, New York, N.Y., of Counsel), *for Plaintiffs-Appellees.*

JAMES DUNLOP PORTER, JR., Assistant United States Attorney, Chief, Civil Division, Brooklyn, New York (Robert A. Morse, United States Attorney for the Eastern District of New York), *for Defendants-Appellants.*

ERIC M. LIEBERMAN, New York, New York, for Hon. Parren J. Mitchell, *et al.* as *Amici Curiae.*

JOSEPH F. MCDONALD, New York, New York, for The Lawyers Committee to End the War and Certain Individuals as *Amici Curiae.*

MULLIGAN, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court, Eastern District of New York, Hon. Orrin G. Judd, District Judge, dated July 25, 1973, granting plaintiff's motion for summary judgment and providing both declaratory and injunctive relief. The judgment declared that "there is no existing Congressional authority to order military forces into combat in Cambodia or to release bombs over Cambodia, and that military activities in Cambodia by American armed forces are unauthorized and unlawful ...." The order further enjoined and restrained the named defendants and their officers, agents, servants, employees and attorneys "from participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia." The effective date of the injunction was postponed until 4:00 o'clock on July 27, 1973 to provide the defendants with an opportunity to apply to this court for a stay pending appeal. A panel of this court heard oral argument on the stay on the morning of July 27, 1973 and unanimously granted defendants' motion for a stay, setting the time for argument of the appeal on August 13, 1973 which was the first day of sitting of the next panel of this court. The parties were given leave to move for further expedition of the appeal. Plaintiffs then made application to Mr. Justice Marshall of the Supreme Court, Circuit Justice for the Second Circuit, for a vacatur of the stay. Mr. Justice Marshall denied the application to vacate the stay on August 1, 1973 writing an opinion in which he noted that either side could further advance the date of the argument before this court. —— U.S. ——. On the motion of plaintiffs, not opposed by defendants, this court on August 1st further accelerated argument of the

appeal to August 8, 1973. On August 2, 1973 plaintiffs made application to Mr. Justice Douglas to vacate the stay and on August 4, 1973 he issued an opinion and order vacating the stay entered by this court. —— U.S. ——. Later in the afternoon of August 4, 1973, Mr. Justice Marshall reinstated the stay announcing that he had polled the other members of the Supreme Court and that they were unanimous in overruling the order of Mr. Justice Douglas. —— U.S. ——. On August 3, 1973, after a hearing before Mr. Justice Douglas, plaintiffs petitioned this court for an *en banc* hearing of this appeal. By order dated August 6th this motion was denied by the unanimous vote of the five active judges of this court who could be readily contacted. In view of the admonition of Mr. Justice Marshall that it is in the public interest that the issues herein be resolved as expeditiously as possible, the convening of this court *en banc* could only have delayed a hearing on the merits.

The argument of this appeal was heard on August 8th and to further speed any further appellate review this court filed its judgment in the late afternoon of that day, reversing the judgment below and dismissing the complaint. Judge Oakes dissented. We announced that opinions would promptly follow so that if the Supreme Court did entertain an appeal it might have the benefit of the views of the panel. Even though the exigencies of time preclude the articulation of the majority view as elaborately or completely as might otherwise be appropriate in a case of this significance, it nonetheless represents our considered and deliberate opinion.

I

At the outset, as the parties agreed below and on the argument on appeal, we should emphasize that we are not

deciding the wisdom, the propriety or the morality of the war in Indo-China and particularly the on-going bombing in Cambodia. This is the responsibility of the Executive and the Legislative branches of the government. The role of the Judiciary is to determine the legality of the challenged action and the threshold question is whether under the "political question" doctrine we should decline even to do that. Ever since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) the federal courts have declined to judge some actions of the Executive and some interaction between the Executive and Legislative branches where it is deemed inappropriate that the judiciary intrude. It is not possible or even necessary to define the metes and bounds of that doctrine here. The most authoritative discussion of the subject is found in Mr. Justice Brennan's opinion in *Baker* v. *Carr*, 369 U.S. 186 (1962) which elaborated criteria that have since guided this court in determining whether a question involving the separation of powers is justiciable or is a political question beyond our purview. In *Orlando* v. *Laird*, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971), this court held that the question of whether or not Congress was required to take some action to authorize the Indo-China war was justiciable under *Baker* v. *Carr*, *supra*, since there was present a judicially discoverable and manageable issue. See *Coleman* v. *Miller*, 307 U.S. 433, 454-55 (1939). On the basis of evidence produced at the hearings in the district court, this court found Congressional authorization in support of the military operations in Southeast Asia from the beginning, relying on the Tonkin Gulf Resolution of August 10, 1964, plus continuing appropriation bills providing billions of dollars in support of military operations as well as the extension of the Military Selective Service Act. We were careful to note:

> Beyond determining that there has been *some* mutual participation between Congress and the President, which unquestionably exists here, with action by the Congress sufficient to authorize or ratify the military activity at issue, it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question. Id. at 1043 (emphasis in original).

It is significant that the court noted that the Tonkin Gulf Resolution of August 10, 1964 had since been repealed on December 31, 1970.

In *Da Costa* v. *Laird,* 448 F.2d 1368 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972) this court specifically rejected the contention that the repeal by Congress of the Tonkin Gulf Resolution removed the Congressional authorization previously found sufficient in *Orlando.* We noted:

> As the constitutional propriety of the means by which the Executive and the Legislative branches engaged in mutual participation in prosecuting the military operations in Southeast Asia, is, as we held in *Orlando,* a political question, so the constitutional propriety of the method and means by which they mutually participate in winding down the conflict and in disengaging the nation from it, is also a political question and outside of the power and competency of the judiciary. Id. at 1370.

The most recent holding of this court now pertinent is *Da Costa* v. *Laird,* 471 F.2d 1146 (1973) where an inductee urged that the President's unilateral decision to mine the harbors of North Vietnam and to bomb targets in that

country constituted an escalation of the war, which was illegal in the absence of additional Congressional authorization. Judge Kaufman found that this was a political question which was non-justiciable, recognizing that the court was incapable of assessing the facts. He stated in part:

> Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an "escalation" of the war or is merely a new tactical approach within a continuing strategic plan. What if, for example, the war "de-escalates" so that it is waged as it was prior to the mining of North Vietnam's harbors, and then "escalates" again? Are the courts required to oversee the conduct of the war on a daily basis, away from the scene of action? In this instance, it was the President's view that the mining of North Vietnam's harbors was necessary to preserve the lives of American soliders (*sic*) in South Vietnam and to bring the war to a close. History will tell whether or not that assessment was correct, but without the benefit of such extended hindsight we are powerless to know.

We fail to see how the present challenge involving the bombing in Cambodia is in any significant manner distinguishable from the situation discussed by Judge Kaufman in *Da Costa* v. *Laird*. Judge Judd found that the continuing bombing of Cambodia, after the removal of American forces and prisoners of war from Vietnam, represents "a basic change in the situation: which must be considered

in determining the duration of prior Congressional authorization." He further found such action a tactical decision not traditionally confided to the Commander-in-Chief. These are precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary, which make the issue political and thus beyond the competence of that court or this court to determine. We are not privy to the information supplied to the Executive by his professional military and diplomatic advisers and even if we were, we are hardly competent to evaluate it. If we were incompetent to judge the significance of the mining and bombing of North Vietnam's harbors and territories, we fail to see our competence to determine that the bombing of Cambodia is a "basic change" in the situation and that it is not a "tactical decision" within the competence of the President. It is true that we have repatriated American troops and have returned American ground forces in Vietnam but we have also negotiated a cease fire and have entered into the Paris Accords which mandated a cease fire in Cambodia and Laos. The President has announced that the bombing of Cambodia will terminate on August 15, 1973 and Secretary of State Rogers has submitted an affidavit to this court[1] providing the justification for our mili-

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[1] AFFIDAVIT OF WILLIAM P. ROGERS

Washington,
District of Columbia, *ss.*

William P. Rogers, being duly sworn, deposes and says as follows:

1. In my capacity as Secretary of State of the United States of America, I have knowledge of and responsibility for the conduct of the foreign relations of the United States, including relations with the Government of Cambodia.

2. It is my understanding that on July 25, 1973, the United States District Court for the Eastern District of New York in the case of Holtzman et al v. Schlesinger et al, ordered the cessation

tary presence and action until that time. The situation fluctuates daily and we cannot ascertain at any fixed time either the military or diplomatic status. We are in no position to determine whether the Cambodian insurgents

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of further military activities by United States armed forces in Cambodia and that this order was stayed by the United States Court of Appeals for the Second Circuit. It is my judgment, that if that stay were not continued, the District Court's order would cause irreparable harm to the United States, to the conduct of our foreign relations, and to the protection of United States nationals in Cambodia.

3. In the conduct of United States relations with Cambodia, the American Ambassador in Phnom Penh has communicated to the Cambodian Government the fact of the enactment on July 1, 1973 of Public Law 93-50 (87 Stat. 99) and Public Law 93-52 (87 Stat. 130). Our Ambassador has further informed the Cambodian Government that the United States Government interprets the aforesaid public laws as requiring a cessation of all combat activities in Cambodia by the armed forces of the United States on and after August 15, 1973.

4. In consequence of the enactment of the aforesaid public laws, intensive planning has been undertaken within the United States Government and between representatives of the American and Cambodian Governments. As a result, plans have been developed which include:

(i) emergency increases in the levels of the Cambodian armed forces;

(ii) accelerated deliveries and distribution during the first two weeks in August of military equipment, especially aircraft and related spare parts, pursuant to the United States Military Assistance Program;

(iii) accelerated deliveries and distribution during this same period of food stuffs, medical supplies and other items for humanitarian relief of the Cambodian population;

(iv) redeployment of Cambodian armed forces, and in some cases civilians whom those forces are protecting, from exposed positions to positions where they can defend themselves and be resupplied in the absence of United States combat air support on and after August 15, 1973.

5. All of the above-described plans are for the purpose of improving the Government of Cambodia's self-defense capability through assistance programs approved by the Congress and the President. All of these plans have been premised upon an as-

are patriots or whether in fact they are inspired and manned by North Vietnam Communists. While we as men may well agonize and bewail the horror of this or any war, the sharing of Presidential and Congressional responsibility particularly at this juncture is a bluntly political and not a judicial question.

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sumption of continued United States combat air support for the Cambodian armed forces through August 14, 1973. On the basis of the information available to me, it is my judgment that the absence of such air support prior to that date would permit hostile military forces to disrupt those plans and would expose United States military and civilian personnel who are responsible for their implementation, to grave risk of personal injury or death.

6. Moreover, in view of this close cooperation and planning between the United States and the Cambodian Government, and considerable reliance placed by the Cambodian Government on this agreed timing, any premature and unilateral cessation of needed air support by the United States would be seen by the Government of Cambodia and by many other governments as a breach of faith by the United States and would seriously undermine the credibility of the United States and impair the conduct of our foreign relations.

7. Quite apart from the question of timing, the order of the District Court, in enjoining "military activities" might well be construed more broadly than the prohibitions against "combat activities" contained in the above-mentioned public laws and thereby could be deemed to preclude such activities as the use of United States armed forces to evacuate United States diplomatic personnel and other United States nationals from Cambodia should this be required at any future time, even after United States combat activities in Cambodia have ceased.

8. The specific consequences as described herein of a failure to stay the District Court's order would constitute irreparable harm to the conduct of the foreign relations of the United States by imperiling the ability of the Government of Cambodia to prepare for assuming full responsibility for its defense, by imperiling the safety of United States nationals in Cambodia, and by undermining the credibility of the United States. In a broader sense, the efforts of the United States to achieve a stable peace in Indochina would be undermined and the cease-fire agreements presently in effect in Viet-Nam and Laos would be gravely jeopardized.

/s/ WILLIAM P. ROGERS

We think the comments of Judge Wyzanski writing for a unanimous Court of Appeals panel in the District of Columbia are particularly apt here:

> Whether President Nixon did so proceed [to end the war] is a question which at this stage in history a court is incompetent to answer. A court cannot procure the relevant evidence: some is in the hands of foreign governments, some is privileged. Even if the necessary facts were to be laid before it, a court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. Otherwise a court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of the nations. *Mitchell* v. *Laird,* 476 F.2d 533, 538 (1973).

The court below and our dissenting Brother assume that since American ground forces and prisoners have been removed and accounted for, Congressional authorization has ceased as determined by virtue of the so-called Mansfield Amendment, P.L. 92-156, 85 Stat. 433, § 601. The fallacy of this position is that we have no way of knowing whether the Cambodian bombing furthers or hinders the goals of the Mansfield Amendment. That is precisely the holding of *Da Costa* v. *Laird, supra,* 471 F.2d at 1157. Moreover, although § 601(a)(1) of the Amendment urges the President

to remove all military forces contingent upon release of American prisoners, it also in § 601 (a)(2) urges him to negotiate for an immediate cease fire by all parties in the hostilities in *Indo-China*. (Emphasis added). In our view, the return and repatriation of American troops only represents the beginning and not the end of the inquiry as to whether such a basic change has occurred that the Executive at this stage is suddenly bereft of power and authority. That inquiry involves diplomatic and military intelligence which is totally absent in the record before us, and its digestion in any event is beyond judicial management. The strictures of the political question doctrine cannot be avoided by resort to the law of agency as the court did below, finding the Congress the principal and the President an agent or servant.[2] Judicial *ipse dixits* cannot provide any proper basis particularly for the injunctive relief granted here which is unprecedented in American jurisprudence.[3]

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[2] The resort of the court below to the Second Restatement of Agency § 38, promulgated by the American Law Institute, is indeed inapposite. Aside from its introductory Scope Note (p. 2) which disclaims the Restatement's applicability to public officers, the denomination of the Congress as the Principal and the President as the Agent in the conduct of hostilities is overly simplistic. It ignores the President's role as Commander-in-Chief, and his primacy in foreign relations, particularly in achieving the peace. See Wallace, The War Making Powers: A Constitutional Flaw? 57 Cornell L. Rev. 719, 744 (1972). It is perhaps significant that the Constitutional Convention explicitly rejected a proposal that the Constitution provide the Congress with the power to declare peace as well as war, and carefully noted that the conduct of war "was an Executive function." 2 M. Farrand, Records of the Federal Convention of 1787, at 313, 319 & n.* (rev. ed. 1937).

[3] To date no other federal court has attempted to halt American involvement in hostilities in Southeast Asia. Our own court as well as the First Circuit has concluded that the war-implementing legislation passed by Congress was sufficient authorization. *Da Costa* v. *Laird*, 448 F.2d 1368 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972); *Orlando* v. *Laird*, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971), aff'g 317 F. Supp. 1013 (E.D.N.Y.

II

Since the argument that continuing Congressional approval was necessary, was predicated upon a determination

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1970) and 317 F. Supp. 715 (E.D.N.Y. 1970) (Judd, J.); *Massachusetts* v. *Laird*, 451 F.2d 26 (1st Cir.), aff'g 327 F. Supp. 378 (D. Mass. 1971). Numerous courts have dismissed suits challenging American involvement on the ground that a "political question" was involved. *Mitchell* v. *Laird*, 476 F.2d 533 (D.C. Cir. 1973); *Da Costa* v. *Laird*, 471 F.2d 1146 (2d Cir. 1973); *Mora* v. *McNamara*, 387 F.2d 862 (D.C. Cir.), cert. denied, 389 U.S. 934 (1967); *Luftig* v. *McNamara*, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967) (cf. *Mitchell* v. *Laird*, *supra*); *Drinan* v. *Nixon*, Civ. No. 73-1424-T (D. Mass., Aug. 8, 1973); *Mitchell* v. *Richardson*, Civ. No. 939-73 (D.D.C., July 23, 1973), notice of appeal filed, Aug. 1, 1973; *Gravel* v. *Laird*, 347 F. Supp. 7 (D.D.C. 1972); *Atlee* v. *Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), aff'd without opinion, 410 U.S. ——, 93 S.Ct. 1545 (1973); *Massachusetts* v. *Laird*, 327 F. Supp. 378 (D. Mass.), aff'd on other grounds, 451 F.2d 26 (1st Cir. 1971) (but cf. *Mitchell* v. *Laird*, *supra*); *Davi* v. *Laird*, 318 F. Supp. 478 (W.D. Va. 1970). One might also include cases such as *Sarnoff* v. *Connally*, 457 F.2d 809 (9th Cir.), cert. denied, 409 U.S. 929 (1972), and *Head* v. *Nixon*, 342 F. Supp. 521 (E.D. La.), aff'd, 468 F.2d 951 (5th Cir. 1972), where the courts dismissed claims that Congressional appropriations were an unconstitutional delegation of the war-making powers, as involving political questions. See also *Atlee* v. *Laird*, *supra*. Other suits challenging the legality of the war have been dismissed on other grounds. *Mottola* v. *Nixon*, 464 F.2d 178 (9th Cir. 1972), rev'g 318 F. Supp. 538 (N.D. Cal. 1970) (standing); *Pietsch* v. *President of the United States*, 434 F.2d 861 (2d Cir. 1970), cert. denied, 403 U.S. 920 (1971) (standing); *Velvel* v. *Nixon*, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970), aff'g 287 F. Supp. 846 (D. Kan. 1968) (standing); *Campen* v. *Nixon*, 56 F.R.D. 404 (N.D. Cal. 1972) (standing); *Gravel* v. *Laird*, *supra* (political question, standing and sovereign immunity); *Da Costa* v. *Nixon*, 55 F.R.D. 145 (E.D.N.Y.), aff'd without opinion, 456 F.2d 1335 (1972).

We find particularly persuasive the scholarly opinion of Judge Adams of the Third Circuit in *Atlee* v. *Laird*, *supra*, the only case involving the Southeast Asia conflict which the Supreme Court has affirmed. In all other cases where review was sought, certiorari has been denied as this note documents. In *Massachusetts* v. *Laird*, 400 U.S. 886 (1970), the Supreme Court denied the Commonwealth of Massachusetts leave to file an original bill of complaint seeking an adjudication of the constitutionality of the United States role in the Indo-China war.

that the Cambodian bombing constituted a basic change in the war not within the tactical discretion of the President and since that is a determination we have found to be a political question, we have not found it necessary to dwell at length upon Congressional participation. We see no need to address ourselves to the Fulbright provisos discussed in Judge Oakes' opinion since they predate the Paris Accord which places the military stance in Cambodia in such focus that we cannot judge their present efficacy or applicability. In any event we agree with his conclusion that they do not affect American forces which is the issue here. We cannot resist however commenting that the most recent expression of Congressional approval by appropriation, the Joint Resolution Continuing Appropriations for Fiscal 1974 (P.L. 93-52), enacted into law July 1, 1973, contains the following provision:

> SEC. 108. Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

Assuming arguendo that the military and diplomatic issues were manageable and that we were obliged to find some participation by Congress, we cannot see how this provision does not support the proposition that the Congress has approved the Cambodian bombing. The statute is facially clear but its applicability is contested by plaintiffs on several grounds which were essentially adopted by the court below. The argument is made that the Congress didn't really mean what it said because it was coerced by

the President who had vetoed Congressional Bills which would have immediately cut off Cambodian funds. Not being able to muster sufficient strength to overcome the veto, the argument runs, the Congress was forced willy nilly to enact the appropriation legislation. Resort is made to the floor debate which it is argued bolsters the view that individual legislators expressed personal disapproval of the bombing and did not interpret the appropriation as an approval to bomb but simply a recognition that it gave the President the power to bomb. It is further urged that since the Constitution entrusts the power to declare war to a majority of the Congress, the veto exercised makes it possible for the President to thwart the will of Congress by holding one-third plus one of the members of either House. We find none of these arguments persuasive.

1) Since the statute is not ambiguous, resort to legislative history is unjustified. See Mr. Justice Jackson's opinion in *Schwegmann* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951).

2) Resort to legislative materials is not permissible where they are contradictory or ambiguous. *NLRB* v. *Plasterers Local 79*, 404 U.S. 116, 129 n.24 (1971). A fair reading of the Congressional Record for June 29, 1973 establishes this proposition. Members of Congress Drinan and the plaintiff Holtzman here for example both voted against the measure because it would authorize the bombing until August 15, 1973.

While the court below relied on the colloquy between Senators Eagleton and Fulbright, it inadvertently omitted the following:

> Mr. EAGLETON. In the light of the legislative history, meaning the statement of former Secretary of Defense

> Richardson that we will continue the bombing unless the funds are cut off, will we with the adoption of this resolution permit the bombing of Cambodia for the next 45 days? This is the question I pose to the Senator from Arkansas.
>
> Mr. FULBRIGHT. *Until August 15.*
>
> Mr. EAGLETON. Would it permit the bombing of Laos?
>
> Mr. FULBRIGHT. It would not prevent it.
>
> 119 Cong. Rec. S 12562 (daily ed. June 29, 1973) [Emphasis added].

In sum, even if the legislative history were considered it is at best ambiguous and does not clearly support the theory that the Congress did not mean what it said.

3) We cannot agree that the Congress was "coerced" by the President's veto. There was unquestionably a Congressional impasse resulting from the desire of a majority of Congress to stop bombing immediately and the desire of the President that his discretion be unfettered by an arbitrarily selected date. Instead of an acute constitutional confrontation, as Senator Javits noted an "agreement" was reached. (119 Cong. Rec. S 12561 (daily ed. June 29, 1973)). This version of the situation is also the conclusion of Judge Tauro in his opinion of August 8, 1973 (*Drinan* v. *Nixon*, Civ. No. 73-1424-T (D. Mass.)) which exhaustively studies the record.

4) While the Constitution vests the war declaring authority in the Congress, the Founding Fathers also conferred the veto power upon the President. (Art. I, § 7, cl. 2). The suggestion that the veto power is impotent with respect to an authority vested solely in Congress by the

Constitution is unsupported by any citation of authority and is hardly persuasive. It of course assumes here that the Cambodian bombing constitutes a new war requiring a new declaration and that it is not part of the extrication of a long suffering nation from an Indo-China war lasting for several years. This again in our view is the nucleus of the issue and we have no way of resolving that question particularly here on a motion for summary judgment.[4]

III

We finally note, although again not necessary in view of our holding in Part I, our disagreement with our colleague Judge Oakes that any of the parties plaintiff have standing. We have held that mere taxpayer status does not confer standing to litigate the constitutionality of the Indo-China war. *Pietsch* v. *President of the United States*, 434 F.2d 861 (2d Cir. 1970), cert. denied, 403 U.S. 920 (1971); see *Velvel* v. *Nixon*, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970). See also *Mottola* v. *Nixon*, 464 F.2d 178 (9th Cir. 1972). In *Berk* v. *Laird*, 429 F.2d 302, 306 (2d Cir. 1970), we held that a serviceman does have standing if he is under orders to fight in the combat to which he

[4] The dissenting opinion of Judge Oakes, finding no Congressional authorization by appropriation by reason of the secret bombings of Cambodia in 1969 and 1970 as reported in the *New York Times* (which is not in the Record before us any more than the Pentagon Papers were before this court in *Da Costa* v. *Laird*, *supra*, 448 F.2d at 1370) if anything emphasizes the inability of the judiciary to make reasoned judgments with manageable or discoverable information in foreign relations particularly in time of war. Secrecy in diplomacy and in military strategy during hostilities has been customary since at least the time of the Trojan War. The relationship of the alleged misfeasance here committed and the action of Congress is again a political question. Its propriety in any event is beyond the scope of appropriate judicial scrutiny. See *Proverbs* 20, v. 18 "Designs are strengthened by counsels: and wars are to be managed by governments."

objects. Here none of the servicemen plaintiffs are presently under orders to fight in Cambodia. They have been relieved of any such military obligation and indeed one has been separated from the service. Their present status in our view moots the appeal as to them and we cannot agree that their status is preserved because of the "cognizable danger of recurrent violation" doctrine of *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). In view of the termination of the air strikes on August 15, 1973 and their present status, we can perceive of nothing more than the merest possibility that such eventuality will occur. *United States* v. *W. T. Grant Co., supra*, requires more than this. See *Atherton Mills* v. *Johnston*, 259 U.S. 13 (1922). Neither do we see any adequate support for the standing of Representative Holtzman. She has not been denied any right to vote on Cambodia by any action of the defendants. She has fully participated in the Congressional debates which have transpired since her election to the Congress. The fact that her vote was ineffective was due to the contrary votes of her colleagues and not the defendants herein. The claim that the establishment of illegality here would be relevant in possible impeachment proceedings against the President would in effect be asking the judiciary for an advisory opinion which is precisely and historically what the "case and controversy" conditions set forth in Article III, Section 2 of the Constitution forbid. See *Correspondence of the Justices* (1793), reprinted in part in H. Hart & H. Wechsler, The Federal Courts and the Federal System 64-66 (2d ed. P. Bator et al. 1973). The judgment sought could hardly have any subsequent binding effect on those who have the responsibility for such a measure. Its effect on the named defendants would be clearly academic and moot since they have no interest in controverting it.

The judgment is reversed and the case is remanded with instructions to dismiss the complaint. The mandate shall issue forthwith.

OAKES, *Circuit Judge* (dissenting):

I believe there is standing for Congresswoman Holtzman under *Baker* v. *Carr*, 369 U.S. 186, 207-08 (1962) and *Coleman* v. *Miller*, 307 U.S. 433, 437-46 (1939). I believe there is standing for the airmen-appellees under *Berk* v. *Laird*, 429 F.2d 302 (2d Cir. 1970) and *Massachusetts* v. *Laird*, 451 F.2d 26, 29 (1st Cir. 1971) which has not been mooted by their return to the United States. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

I believe there is justiciability under *Da Costa* v. *Laird*, 471 F.2d 1146, 1156 (2d Cir. 1973), (*Da Costa* III) where the question "whether a radical change in the character of war operations . . . might be sufficiently measurable judicially to warrant a court's consideration . . . ." was expressly reserved. There is here "a manageable standard" under *Da Costa* III and *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), since there has been such a "radical change in the character of war operations." The Defense Department is continuing to bomb in Cambodia despite the cease-fire in Vietnam and despite the return of our prisoners of war from North Vietnam. The justiciable question then is whether there is any Constitutional authorization for the employment of United States armed forces over Cambodia, now that the war in Vietnam has come to an end. There is no question under the law of this Circuit, *Orlando* v. *Laird*, 443 F.2d 1039, 1042 (2d Cir.) *cert. denied*, 404 U.S. 869 (1971), that the Executive lacks unilateral power to commit American forces to combat

absent a "belligerent attack" or "a grave emergency." *See Mitchell* v. *Laird*, 476 F.2d 533 (D.C. Cir. 1973).

Has Congress ratified or authorized the bombing in Cambodia by appropriations acts or otherwise? Congress can confer power on the Executive by way of an appropriations act. *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947) (creation of new agency by Executive Order ratified by appropriation). And this Circuit has expressly held that congressional authorization for the war in Vietnam may be found in appropriations acts. *Da Costa* v. *Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972) (*Da Costa II*). *Orlando* v. *Laird, supra*, 443 F.2d at 1042.

I do not, moreover, agree with appellees' argument that the Fulbright "proviso" adopted in all of the recent appropriations bills and limiting the use of Defense Department funds to support "Vietnamese or other free world forces in actions designed to provide military support and assistance to the government of Cambodia or Laos," limited all prior authorizations to expenditures for United States forces in Cambodia only in aid in the release of Americans held as prisoners of war. *E.g.*, Armed Forces Military Procurement Act of 1971, Pub. L. No. 91-441, §502(a)(1), 84 Stat. 905 (1970). The language of the appropriations acts seems to me to differentiate between "other free world forces" and "Armed Forces of the United States," *e.g.*, *id.* §502(a)(2). The legislative history indicates also that there is a difference between "other free world forces" and "United States armed forces." Even though the Fulbright proviso did not provide any *affirmative* grant of authority to the President to use "Armed Forces of the United States" in Cambodia, 119 Cong. Rec. S 7385-87 (daily ed. Apr. 13, 1973), Senator Fulbright himself considered the

proviso operative only in respect to "South Vietnamese or other *foreign* military operations in support of the Cambodian or Laotian Governments." *Id.* at S 7385 (emphasis supplied).

Thus an argument could be made that congressional authorization of appropriations with knowledge of our "presence" in Cambodia was ratification. But for authorization on the part of Congress by way of an appropriation to be effective, the congressional action must be based on a knowledge of the facts. *Greene* v. *McElroy*, 360 U.S. 474, 506-07 (1959) (appropriation to Defense Department for security program did not ratify procedure denying right of an individual to confront witnesses). I am aware of only one instance in which it has previously been argued that a war was illegal as a result of Congress being misinformed as to the underlying facts surrounding American participation in that war. While the argument was unique and unsuccessful to boot, however, time has vindicated it, I believe. Furthermore, it was advanced by one whose views are worth consideration, even if they were expressed in "dissent," so to speak. I refer of course to Abraham Lincoln and his argument as a lone Congressman on January 12, 1848, in opposition to our "incursion" into Mexico and what later was called the Mexican War. *See* Cong. Globe, 30th Cong. 1st Sess. 93 *et seq.* (Appendix 1848).

And here, incredibly enough, it appears that neither the American people nor the Congress, at the time it was voting appropriations in aid of the war in Vietnam, were given the facts pertaining to our bombing in Cambodia. Recent disclosures have indicated that Air Force B-52 bombers were secretly attacking Cambodia in 1969, 1970 and even later while the United States was publicly proclaiming respect for Cambodian neutrality. *See* N.Y. Times July 17,

1973, at 1; July 18, 1973, at 1, July 22, 1973, Sec. E, at 3; July 24, 1973, at 1; July 25, 1973, at 1; July 29, 1973 at 1; Aug. 8, 1973, at 6; Aug. 9, 1973, at 7.

The government argues that these secret bombings occurred in 1969 and 1970, and ended when our activities in Cambodia became open subsequently. But the Congress whose ratification by way of appropriations acts is contended for here did not become aware of these covert bombings until July of 1973. And meanwhile the Congress had declared in the so-called Mansfield Amendment that it was "the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina . . . ." Appropriations Authorization-Military Procurement Act of 1972, Pub. L. No. 92-156, § 601, 85 Stat. 423 (92nd Cong., 1st Sess. 1971).

The combination of concealment of the facts from Congress together with the enactment of a policy of "earliest practicable" withdrawal do not amount in my mind to an appropriations carte blanche to the military to carry on bombing in Cambodia after the cease-fire, withdrawal of our troops from Vietnam, and return of our prisoners of war from North Vietnam.

We come then to the effect of the legislation, following upon a presidential veto of an immediate prohibition against the use of funds to bomb in Cambodia, adopted as a compromise this July 1st: the Continuing Appropriations Act for Fiscal Year 1974, Pub. L. No. 93-52, 93rd Cong. 2nd Sess. (July 1, 1973) which expressly provided that " . . . on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." § 108. In

colloquy between Senators Eagleton and Fulbright, inadvertently omitted in the briefs of appellees and the opinion of the lower court, the former inquired whether "the adoption of this resolution [would] permit the bombing of Cambodia" and Senator Fulbright replied, "Until August 15". 119 Cong. Rec. S 12562 (daily ed. June 29, 1973). Again, in the same colloquy Senator Fulbright, conceding "Presidential power", said that "The President has the power to do a lot of things of which I do not approve," after being asked by Senator Eagleton whether under the resolution the President's "power to bomb in Indochina . . . will now be sanctioned by our action." *Id.* In neither case, however, is there recognition of *legality* or *past authorization*. Senator Fulbright had previously stated, as Judge Judd recognized, that "The acceptance of an August 15 cut off date should in no way be interpreted as recognition by the committee of the President's authority to engage U.S. forces in hostilities until that date. The view of most members of the committee has been and continues to be that the President does not have such authority in the absence of specific congressional approval." 119 Cong. Rec. S 12560 (daily ed. June 29, 1973).

It can be argued that Congress could, if it had so desired, cut off the funds for bombing Cambodia immediately by overriding the Presidential veto. This was indeed championed by those voting against the ultimate compromise Resolution. But it does not follow that those who voted in favor of the Resolution were thereby putting the Congressional stamp of approval on the bombing continuation. While the Resolution constituted a recognition that Executive *power* was being exercised, it did not constitute a concession that such exercise was rightful, lawful or constitutional.

It may be that those voting for the Resolution thought that in some way previous appropriations acts or the omission expressly to prohibit a continuation of bombing after the cease-fire and return of our prisoners of war amounted to an authorization, which could only be limited by affirmative congressional action. But as I have previously suggested I cannot find any express congressional authorization for such a continuation of the Cambodian bombing, nor do I think that authorization can be implied from prior appropriations acts. This being true, affirmative action on the part of Congress was not necessary as a matter of constitutional law. An agreement by the Executive to some cut off date was essential, however, because the *legality* of bombing continuation might not be tested or testable for months to come, by the very nature of the judicial process. Therefore, Congress as I see it, took the only practical way out. It acknowledged the reality of the Executive's exercise of power even while it disputed the Executive's authority for that exercise. It agreed to a final cut-off date as the best practical result but never conceded the legality or constitutionality of interim exercise.

Thus the Resolution of July 1, 1973 cannot be the basis for legalization of otherwise unlawful Executive action. We are talking here about the separate branches of government, and in doing so we must distinguish between the exercise of power on the one hand and authorization for such exercise on the other. That the Executive Branch had the power to bomb in Cambodia, there can be no doubt; it did so, and indeed is continuing to do so. Whether it had the constitutional authority for its action is another question.

If we return to fundamentals, as I think we must in the case of any conflict of view between the other two Branches of Government, it will be recalled that the Founding Fathers

deliberately eschewed the example of the British Monarchy in which was lodged the authority to declare war and to raise and regulate fleets and armies. *See* The Federalist No. 69 (A. Hamilton). Rather these powers were deliberately given to the Legislative Branch of the new American Republic in Article I, section 8 of the Constitution. *See* 7 Works of Alexander Hamilton 81 (J. Hamilton ed. 1851), cited in Note, *Congress, The President, and The Power to Commit Forces to Combat,* 81 Harv. L. Rev. 1771, 1773 n.14 (1968). I fail to see, and the Government in its able presentation has failed to point out, where the Congress ever authorized the continuation of bombing in Cambodia after the cease-fire in Vietnam, the withdrawal of our forces there, and the return of our prisoners of war to our shores. Accordingly, I must dissent, and although on a somewhat different analysis would affirm the judgment below.

Order Denying Rehearing in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of September, one thousand nine hundred and seventy-three.

Docket No. 73-2094

ELIZABETH HOLTZMAN, individually and in her capacity as a member of the United States House of Representatives, 1st LT. ARTHUR WATSON, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam, CAPTAIN MICHAEL FLUGGER, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam, CAPTAIN JAMES H. STRAIN, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam, and CAPTAIN DONALD E. DAWSON, 307th Strategic Wing, United States Air Force, U-Tapo, Thailand,

Plaintiffs-Appellees,

—v.—

JAMES R. SCHLESINGER, individually and as Secretary of Defense, JOHN L. MCLUCAS, individually and as Secretary of the Air Force, and WILLIAM P. CLEMENTS, individually and as Deputy Secretary of Defense,

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken at the request of such a judge, and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Oakes dissents.

IRVING R. KAUFMAN
Chief Judge

United States District Court's Opinion of June 13, 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 73-C-537.

June 13, 1973.

ELIZABETH HOLTZMAN, Individually and in her capacity as a Member of the United States House of Representatives,

Plaintiff,

—v.—

ELLIOT L. RICHARDSON, Individually and as Secretary of Defense and ROBERT C. SEAMANS, JR., Individually and as Secretary of the Air Force,

Defendants.

JUDD, *District Judge*:

MEMORANDUM AND ORDER

Plaintiff, a member of the United States House of Representatives from a Brooklyn district, seeks a determination that the President of the United States and the military personnel under his direction and control may not engage in intensive combat operations in Cambodia and elsewhere in Indochina in the absence of congressional authorization.

Motions

1. Plaintiff has moved for summary judgment declaring that the defendants may not order American military forces to combat in Cambodia and granting appropriate injunctive relief.

2. Plaintiff has also moved to serve an amended and supplemental complaint adding as plaintiffs three Air Force officers stationed in Guam, none of whom are residents of the Eastern District of New York.

3. Congressman Parren J. Mitchell of the Seventh Congressional District of Maryland, together with seven other Congressmen from districts not within the Eastern District of New York, have moved for leave to file a brief as *amici curiae*.

4. Defendants have moved to dismiss the complaint for failure to state a valid claim for relief because (a) plaintiff lacks standing; (b) the court lacks jurisdiction over the subject matter; and (c) the complaint involves non-justiciable political questions on which relief cannot be granted. Defendants also assert that the motion for summary judgment is premature.

No motion has yet been made to implement the statement that the complaint is brought on behalf of all similarly situated Congressmen. It is not yet necessary to determine whether the case may properly be treated as a class action.

Facts

The complaint was filed on April 17, 1973. Plaintiff asserted among other things that her right to an undiluted

vote upon the declaration of hostilities was impaired by presidential action in engaging in extensive combat in Cambodia without congressional authorization. She pointed out that cease-fire had been negotiated in Vietnam, all American servicemen had been withdrawn, and all American prisoners of war had been released; and she asserted that no congressional authorization exists for committing American forces to combat in Cambodia.

An order to show cause why the court should not declare continued military activities in Cambodia to be unlawful was signed on April 19 by Judge Dooling, to whom the case had been assigned as a related case. Before the return date of the motion, Judge Dooling determined that the case was not in fact related to prior matters before him, and directed that it be reassigned under this court's random assignment plan. On the return date of the order to show cause on April 26, 1973, the matter was adjourned at defendants' request until May 18, with answering papers to be served by May 16.

The motion for summary judgment and injunctive relief was served and filed on May 8, 1973, accompanied by a statement of allegedly undisputed facts pursuant to Rule 9(g) of this court's General Rules. In particular, plaintiff asserted that the United States is currently engaged in large-scale combat air operations in Cambodia involving hundreds of war planes based in Thailand and Guam, and that United States war planes dropped 39,500 tons of explosives on Cambodia during March 1973 and flew 180 combat missions daily during the first three weeks of April. Plaintiff further asserts as undisputed material facts that the last American serviceman was withdrawn from Vietnam on March 28, 1973 and the last American prisoner of war was repatriated on April 1, 1973, and that although no Con-

gressional authorization exists for the commitment of American forces to combat in Cambodia, the Executive has informed Congress that it is prepared to continue its military activities whether or not the Congress appropriates funds for the Cambodian combat operations.

Defendants' response asserts that there are still over 1,300 missing in action in the Vietnam hostilities who have not yet been accounted for. Defendants also assert by affidavit of the Chief of the Civil Division of the United States Attorney's office that "there may well be dispute as to assertions made in plaintiff's Rule 9(g) statement." They request time to submit papers addressed to the merits.

The plaintiffs who are proposed to be added assert that they are being compelled to comply with unlawful orders, and to risk their lives in unauthorized bombing missions over Cambodia.

The brief of the Protestant, Catholic and Jewish religious groups, which appear as *amici*, assert that the existence of Congressional authorization to make war is justiciable, and point out that participation in Cambodian hostilities may conflict with the Agreement on Ending the War and Restoring Peace in Vietnam.

Discussion

It is necessary to deal first with the question of the timing of the motions, then with the issue of plaintiff's standing and other jurisdictional questions, and finally with the particular motions of the several parties.

Timing

The government relies on the provision of F.R.Civ. P. 12(a) that the United States or an officer or agency thereof

has sixty days "after the service upon the United States attorney of the pleading" within which to answer a complaint.

Rule 56, however, provides that a party may move for summary judgment "at any time after the expiration of 20 days from the commencement of the action." Plaintiff's motion for summary judgment was served 21 days after the complaint was filed.

The difference between the two rules is significant. The time is computed in different ways. Since an action is commenced under F.R.Civ.P. 3 by the filing of a complaint, regardless of the time when it is served, the measure of time in Rule 56 is unrelated to the time in Rule 12. Moreover, Rule 56 does not provide for a longer time before a motion can be made against a government agency than one against a private party.

Judge Charles E. Clark, a distinguished authority on procedure, criticized the original federal rule for not permitting the filing of a motion for summary judgment as soon as an action is brought. See his dissent in United States v. Adler's Creamery, Inc., 107 F.2d 987, 992 (2d Cir. 1939). The 1946 amendment, which permitted a motion for summary judgment in advance of answer, should be interpreted in a manner to expedite the disposition of litigation. There is no need to impart into it the 60-day period for government answer that was specified in old Rule 12. A plaintiff moving for summary judgment before answer may be required to face a somewhat higher standard, however. As Professor Moore has suggested, a motion before answer should not be granted "unless it is clear that an issue of material fact cannot be presented." 6 Moore's Federal Practice (2d ed. 1948, 1972) ¶ 56.07, p. 2092.

There has never been any requirement of any delay in the consideration of a preliminary injunction in an action against a United States officer or agency, except as the court in its discretion may find to be appropriate.

The court therefore rejects the argument that the motion for summary judgment was premature.

Defendants' Motion to Dismiss

Jurisdiction

Defendants' three grounds for this motion to dismiss are all essentially jurisdictional, whether described as relating to standing, subject matter, or political question.

Standing

Under Article III, § 2, Clause 1, of the Constitution, the jurisdiction of federal courts is limited to "cases" and "controversies." Judicial definitions of the elements requisite for "cases" and "controversies" have proved to be elusive.

Unlike case or controversy, terms specifically enumerated in Article III, "standing" is not mentioned in the Constitution. It received its first full expression in Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923).

Later, in Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), the Court stated that political questions, advisory opinions, and lack of standing result in there being no justiciable controversy. Whether standing is denominated a component of jurisdiction or of justiciability may at first blush seem unimportant, due to the requirement that both issues must be resolved before any determination can be made of the merits of the controversy. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973).

However, a complaint may be dismissed for lack of jurisdiction of the subject matter only if the claim is so attenuated and insubstantial as to be absolutely devoid of merit. Newburyport Water Co. v. Newburyport, 193 U.S. 561, 24 S.Ct. 553, 48 L.Ed. 795 (1904); Baker v. Carr, *supra*.

Plaintiff has raised a serious constitutional question dealing with the war-making power of Congress enumerated in Article I, § 8 of the Constitution. The seriousness of this question has been recognized repeatedly within this circuit. Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971). The delicate balance in the relationship between Congress and the President concerning the power to wage war is a controversy arising under the Constitution and therefore within the jurisdiction of this court. 28 U.S.C. § 1331(a).

Whether a particular party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of it is what has traditionally been referred to as the question of standing to sue. In Sierra Club v. Morton, 405 U.S. 727, 732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972), the Supreme Court held that when a party, such as the plaintiff here, does not rely on any specific statute authorizing invocation of the judicial process,

> the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," Baker v. Carr . . . as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen.

The heart of the question becomes whether the plaintiff has alleged such a personal stake in the outcome of the

controversy as to assure the concrete presentation of issues in an adversary context so that a court will be properly guided in determining difficult issues. The controversy involved must be a substantial one admitting of specific relief. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937).

In the present case the court is not being asked to decide ill-defined controversies over constitutional issues. The issue has been focused as sharply as possible: Whether the President's orders directing the bombing of Cambodia constituted a usurpation of Congress' war making power under Article I, § 8 of the Constitution. Nor is this a case in which the court is being asked to decide a hypothetical question or abstract issue. Plaintiff is not asking for a determination whether the President would violate the Constitution by engaging in certain acts, but rather a determination that the present action of the President violates the Constitution. Nor is this a collusive suit where the parties are suspected of sharing the same interests.

Plaintiff *qua* Congresswoman does not merely suffer in some indefinite way in common with people generally. She is a member of a specific and narrowly defined group—the House of Representatives. As a Congresswoman, plaintiff is called upon to appropriate funds for military operations, raise an army, and declare war. Additionally, plaintiff has a continuing responsibility to insure the checks and balances of our democracy through the use of impeachment. When a plaintiff is a member of a narrowly defined group, which has been more directly affected by the conduct in question than has the general population, the test for standing should be met. Scott, Standing in the Supreme Court —a Functional Analysis, 86 Harv. L.Rev. 645 (Feb. 1973).

The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the federal government. Flast v. Cohen, *supra*.

Professor Jaffee has stated, in Standing Again, 84 Harv. L.Rev. 633, at 634, 635 (1971),

> My own view has been and continues to be that a plaintiff who does not have a "protected interest," whether as an individual or as a group, does not have a *right* to review, but that a court in its discretion may at the suit of such a person review the legal question if it deems such consideration to be in the public interest.
>
> . . . I believe . . . that any citizen can constitutionally be a plaintiff . . . in a "public law" suit even though he suffers no injury whatever beyond his concern for the public interest.

In Mitchell v. Laird, 476 F.2d 533 (D.C. Cir. March 20, 1973), thirteen members of the United States House of Representatives filed a complaint against the President and the Secretaries of State, Defense, Navy, and Air Force, seeking declaratory and injunctive relief against continued warfare in Indochina. In finding that the plaintiffs had standing, the Court relied upon the fact that it would be the duty of plaintiffs to consider impeachment if defendants' actions contravened the Constitution, that plaintiffs have a quite distinct duty to determine whether to make appropriations to support the hostilities, and that plaintiffs might have to take other legislative actions related to such hostilities, such as raising an army or enacting other civil or criminal legislation.

Standing of legislators was also upheld in Trombetta v. State of Florida, 353 F.Supp. 575 (M.D.Fla. 1973), ruling that members of the Florida Legislature had standing to seek a declaratory judgment whether the proposed Twenty-seventh (Equal Rights) Amendment to the United States Constitution was repugnant to Articles V and VI of the United States Constitution; and in Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), an original proceeding in mandamus by members of the Kansas Legislature against the Secretary of the Senate of Kansas and others to compel the Secretary to erase an endorsement on the Senate resolution ratifying the Child Labor Amendment to the United States Constitution. The *Trombetta* and *Coleman* cases, involving state legislatures, are not completely parallel, but a member of Congress should have an equal right to invoke the jurisdiction of a federal court.

Congresswoman Holtzman is a member of a well defined group that is directly affected by defendants' action. She has presented a sharply focused controversy in an adversary context. Her responsibilities as a Congresswoman give her the nexus necessary to have standing to contest the policies of defendants that allegedly infringe upon her Article I duties.

The standing of the airmen as added plaintiffs is clear, Berk v. Laird, 429 F.2d 302 (2d Cir. 1970), if they can pass the test of venue, discussed later.

Political Question

In determining whether there is subject-matter jurisdiction, the court must consider whether the case presents a "political question" outside its jurisdiction, before it can reach the merits of the controversy. This is a facet of the problem of justiciability.

The Second Circuit has shaped its formulation of the political question doctrine from guidance provided by the Supreme Court in cases such as Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); and Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). In Berk v. Laird, *supra*, 429 F.2d at 305, it held that a soldier seeking to enjoin orders in the Vietnam hostilities as lacking constitutional authority had a right to ask a court to determine whether there were "judicially discoverable and manageable standards" for resolving the issue. In Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971), it held that courts should not review the form of congressional authorization, once it had been determined that there was "any action by the Congress sufficient to authorize or ratify the military activity in question." In DaCosta v. Laird, 471 F.2d 1146, 1155 (2d Cir. 1973), it held that judges could not appropriately determine

> whether a specific military operation constitutes an "escalation" of the war or is merely a new tactical approach within a continuing strategic plan.

Defendants rely on this statement but fail to consider the court's further statement (p. 1156) that

> We specifically do not pass on the point urged by appellant whether a radical change in the character of war operations—as by an intentional policy of indiscriminate bombing of civilians without any military objective—might be sufficiently measurable judicially to warrant a court's consideration, i.e., might contain a standard which we seek in this record and do not find.

The appeal in that case was from an order denying injunctive relief, after the court had reviewed documentary material submitted by both sides. Here the issue arises on a motion to dismiss the complaint on its face. The motion for summary judgment on the merits is not being considered yet.

The teaching of those cases is that the political question exception to jurisdiction depends on the facts of the particular case, but that the question of the balance of constitutional authority to declare war, as between the executive and legislative branches, is not a political question.

The Second Circuit rule was not repudiated by the Supreme Court's summary affirmance of Atlee v. Laird, 347 F. Supp. 689 (1972), aff'd, 411 U.S. 911, 93 S.Ct. 1545, 36 L.Ed.2d 304 (1973). The district court there dealt with a question whether Congress could constitutionally authorize warfare by appropriation bills rather than whether Congress had in fact given approval to the acts of the executive. The district court in *Atlee* referred to the rapid changes in world politics as a reason for not taking jurisdiction, but stated (p. 707):

> This, of course, is one reason justifying a court's taking small steps in sensitive areas, because the judiciary lacks the flexibility found in the political departments, to deal adequately with a constantly changing world scene.

The *Atlee* case dealt with a general challenge to "the constitutionality of the war in South East Asia." 347 F.Supp. at 691. Lack of merit may also have been mingled with procedural issues in the affirmance of the *Atlee* case, since the Supreme Court had previously refused to review cases which upheld the President's authority to use American

forces in Vietnam. It had denied certiorari in the ***Berk,*** *Orlando,* and *DaCosta* cases. Berk v. Laird, 429 F.2d 302, cert. denied, 404 U.S. 869, 92 S.Ct. 94, 30 L.Ed.2d 113 (1971); Orlando v. Laird, 443 F.2d 1039, cert. denied, 404 U.S. 869, 92 S.Ct. 94, 30 L.Ed.2d 113 (1971); DaCosta v. Laird, 448 F.2d 1368, cert. denied, 405 U.S. 979, 92 S.Ct. 1193, 31 L.Ed.2d 255 (1972).

The present case, dealing with Cambodian combat operations, involves other issues, for the Senate and the House have spoken separately on Cambodia, and the entire Congress, in approving limited foreign aid to Cambodia, 22 U.S.C. § 2415(g), expressly stated in 1972 (P.L. 92-226) that such aid

> . . . shall not be construed as a commitment by the United States to Cambodia for its defense.

Judge Dooling said in his opinion in DaCosta v. Laird of May 24, 1972, concerning political question:

> The actual conduct of a defined war, *when that war is in its lawful progress,* is such an area. (Emphasis added).

The present case, attacking only the use of bombers in Cambodia after the Vietnam cease-fire, has a narrower reach than *Atlee* and may present one of the "small steps in sensitive areas" which is within the realm of justiciability under the district court's opinion in *Atlee.*

This is one of the first suits brought *after* the withdrawal of American troops from Vietnam and the return of prisoners of war. Reluctance to jeopardize the safety of American soldiers or prisoners is no longer a barrier to judicial determination of the constitutionality of a phase of war activity.

Therefore the case does not prersent a tactical decision in an ongoing war like *DaCosta* III, *supra*, 471 F.2d 1146 (whether to mine Haiphong harbor). Rather it involves the question whether the authorized Vietnam war has terminated. Courts have often been asked to determine when a war has ended and peace has begun. *E.g.*, United States v. Curtiss-Wright Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936); *cf.*, United States v. Swift, Crim. No. 72-747-W, District of Massachusetts, Opinion of Wyzanski, J., March 28, 1973.

The political question doctrine does not appear to justify dismissal of this complaint before examination of the merits, on which this court has reached no decision.

Advisory Opinion

Plaintiff is not seeking a judicial determination as to her rights upon the happening of some events in the future. Rather, she is seeking a judicial declaration that military operations currently being conducted in Cambodia are in violation of the United States Constitution. This does not come within the rule forbidding advisory opinions, a rule which stems from the risk that comes from passing on abstract questions rather than limiting decisions to concrete cases in which a question is precisely framed by a clash of genuine adversary argument. Wright, Federal Courts (2d ed. 1970) pp. 37-38; Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 Yale L.J. 816, 830-31 (1968).

Venue

There is no doubt of the proper venue of this action as originally brought by plaintiff, a Brooklyn resident, since

express provision in 28 U.S.C. § 1391(e)(4) permits suit against a federal officer or agency in any judicial district where the plaintiff resides. Suit by the airmen might have to be brought in some other district if they were not joined in this action, or if plaintiff Holtzman did not have standing. Their presence as plaintiffs in a suit properly brought by Congresswoman Holtzman, however, does not prevent the venue being proper for all plaintiffs, since only one plaintiff need be a resident of the district. Natural Resources Defense Council v. Tennessee Valley Authority, 340 F.Supp. 400 (S.D.N.Y. 1971), rev'd on other grounds, 459 F.2d 255 (2d Cir. 1972).

Amount in Controversy

In determining the amount in controversy, the court may consider the pecuniary result to either party which a judgment might produce. Berman v. Narragansett Racing Assoc., 414 F.2d 311 (1st Cir. 1969); Bass v. Rockefeller, 331 F.Supp. 945 (S.D.N.Y. 1971); Note, Federal Jurisdictional Amount: Determination of the Matter in Controversy, 73 Harv. L. Rev. 1369 (1960).

With millions of dollars in expenditures involved as part of the bombing operation, there is no question that the requirement of $10,000 or more in controversy is met.

Plaintiff's Motions

Addition of parties is not governed by F.R. Civ. P. 15, concerning amendments of pleadings, but F.R. Civ. P. 21, which states that

> Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action. . . .

Burlington Hospital v. Charles Pfizer & Co., 48 F.R.D. 343 (S.D.N.Y. 1969); Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273 (S.D.N.Y. 1970).

It is entirely appropriate and timely to permit the addition of the proposed military plaintiffs.

Summary Judgment

Plaintiff's motion for summary judgment will be held in abeyance pending the receipt of additional papers from the defendants. In view of the length of time the court has had the matter under advisement, during which defendants have had an opportunity to assemble the pertinent facts, they should be prepared to set forth their contentions without much further delay.

It is ordered:

(1) That defendants' motion to dismiss the complaint be denied;

(2) That plaintiff be granted leave to serve an amended and supplemental complaint adding First Lieutenant Arthur Watson, Captain Michael Flugger, and Captain James H. Strain as plaintiffs;

(3) That defendants answer such amended and supplemental complaint within ten days after its service on the United States Attorney;

(4) That Hon. Parren J. Mitchell, Bella S. Abzug, Donald M. Fraser, Herman Badillo, Benjamin I. Rosenthal, Robert W. Kastenmeier, Don Edwards, and Michael J. Harrington, Members of Congress, be granted leave to file briefs in the case as *amici curiae;*

(6) That the matter be set down for argument on that motion for summary judgment by June 25, 1973; and

(6) That the amtter be set down for argument on that motion at 10:00 a.m. on June 29, 1973.

United States District Court's Opinion of July 25, 1973

United States District Court,
E. D. New York.

No. 73-C-537.

July 25, 1973.

ELIZABETH HOLTZMAN, Individually and in her capacity as a member of the United States House of Representatives, et al., Plaintiffs,

v.

JAMES R. SCHLESINGER, Individually and as Secretary of Defense, et al., Defendants.

MEMORANDUM AND ORDER

JUDD, District Judge.

Plaintiffs seek a determination that the President of the United States and the military personnel under his direction and control may not engage in intensive combat operations in Cambodia and elsewhere in Indochina in the absence of Congressional authorization required under Article I, § 8, Clause 11 of the Constitution. The case is before the court on plaintiffs' motion for summary judgment for lack of genuine issues of material fact. Additionally, plaintiffs seek declaratory and/or injunctive relief.

Plaintiffs have also moved to add as plaintiff another Air Force officer on active duty, Captain Donald Dawson,

and to stay the defendants from ordering him to engage in bombing missions over Cambodia.

Posture of the Case

At an earlier stage this court denied defendants' motion to dismiss the complaint, and overruled the contentions that Congresswoman Holtzman lacked standing to challenge the military activities in question and that the controversy presented a nonjusticiable political question.

Both sides were given an opportunity to submit any additional papers that would bear on the appropriateness of summary judgment.

Facts

Review of the facts may begin with 1970, since the earlier phases of hostilities in Indochina have been summarized in an earlier case.

This court held in September 1970 in Berk v. Laird, 317 F.Supp. 715 (E.D.N.Y.1970), aff'd sub nom., Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), that Congress had authorized hostilities in Vietnam to that date through a series of appropriation acts.

Hostilities in Cambodia

In response to Presidential pronouncements concerning the necessity of military action in Cambodia, there was a series of Congressional responses seeking in the main to limit such military action, and culminating in two laws enacted on July 1, 1973 which directed that no funds might be expended for Cambodian combat activities after August 15, 1973.

On April 30, 1970, the President stated in an address to the nation that "North Vietnam has occupied military sanctuaries all along the Cambodian frontier with South Vietnam," that Cambodia had therefore called on the United States for assistance, and that attacks were therefore being launched "to clean out major enemy sanctuaries on the Cambodian-Vietnam border." The Situation in Southeast Asia, 6 Presidential Documents 596, 597, 598.

On June 30, 1970, a report by the President on the Cambodian operation, released at San Clemente, California, stated that all American troops had withdrawn from Cambodia, but that the United States would continue to conduct air interdiction missions to prevent supplies and personnel being moved through Cambodia toward South Vietnam, and that "We do this to protect our forces in South Vietnam." The President also stated that one of the reasons for attacking the enemy's "sanctuaries" in Cambodia was that this would "enhance the prospects of a negotiated peace." The Cambodian Operation, 6 Presidential Documents 843, 850, 852.

The so-called Fulbright proviso, limiting military support to Cambodia except to the extent necessary to insure the safe withdrawal of United States forces from Southeast Asia and the release of American prisoners of war, was adopted by the Congress during the summer of 1970 and inserted in the War Forces-Military Procurement Act of 1971 and became law with the President's approval on October 7, 1970. This proviso, which was repeated in every subsequent military appropriation and authorization act, reads as follows:

> . . . nothing [herein] shall be construed as authorizing the use of any such funds to support Vietnamese

> or other free world forces in actions designed to provide military support and assistance to the Government of Cambodia or Laos: *Provided further,* That nothing contained in this section shall be construed to prohibit support of actions required to insure the safe and orderly withdrawal or disengagement of U.S. Forces from Southeast Asia, or to aid in the release of Americans held as prisoners of war.

P.L. 91-441, 84 Stat. 905; P.L. 91-668, 84 Stat. 2020; P.L. 92-156, 85 Stat. 423; P.L. 92-204, 85 Stat. 716; P.L. 92-436, 86 Stat. 734; P.L. 92-570, 86 Stat. 1184.

On the evening of the same day the Fulbright proviso became law, October 7, 1970, the President addressed the nation by radio and television and stated that the North Vietnamese were carrying on aggression in Laos and Cambodia as well as in Vietnam and that "The war in Indochina has been proved to be of one piece; it cannot be cured by treating only one of its areas of outbreak." The New Initiative for Peace in Southeast Asia, 6 Presidential Documents 1349, 1350.

The Special Foreign Assistance Act of 1971 (P.L. 91-652, 84 Stat. 1942), approved January 1, 1971, provided:

> Sec. 7. (a) In line with the expressed intention of the President of the United States, none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia.
>
> (b) Military and economic assistance provided by the United States to Cambodia and authorized or ap-

> propriated pursuant to this or any other Act shall not be construed as a commitment by the United States to Cambodia for its defense.

On February 25, 1971, the President submitted a foreign policy report to Congress, saying again that the war in Indochina was "of one piece," that because of North Vietnamese infiltration in Cambodia "We faced the prospect of one large enemy base camp 600 miles along South Vietnam's flank;" and that our policy for Cambodia included "air missions against enemy supplies and personnel that pose a potential threat to South Vietnam or seek to establish base areas relevant to Vietnam." United States Foreign Policy for the 1970's: Building for Peace, 7 Presidential Documents 305, 328, 332.

On November 17, 1971, the so-called Mansfield amendment became law by action of Congress with the President's approval, and expressed the United States policy "to terminate at the earliest practicable date all military operations of the United States in Indochina." The pertinent portions of this amendment, which was part of the Appropriations Authorizations-Military Procurement Act, 1972, state:

> Sec. 601. (a) It is hereby declared to be the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date certain, subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or

such forces. The Congress hereby urges and requests the President to implement the above-expressed policy by initiating immediately the following actions:

(1) Establishing a final date for the withdrawal from Indochina of all military forces of the United States contingent upon the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces.

(2) Negotiate with the Government of North Vietnam for an immediate cease-fire by all parties to the hostilities in Indochina.

(3) Negotiate with the Government of North Vietnam for an agreement which would provide for a series of phased and rapid withdrawals of United State military forces from Indochina in exchange for a corresponding series of phased releases of American prisoners of war, and for the release of any remaining American prisoners of war concurrently with the withdrawal of all remaining military forces of the United States by not later than the date established by the President pursuant to paragraph (1) hereof or by such earlier date as may be agreed upon by the negotiating parties.

In the Defense Appropriation Act of 1972 (P.L. 92-204), approved December 18, 1971, Congress specified:

Sec. 738(a) Not to exceed $2,500,000,000 of the appropriations available to the Department of Defense dur-

> ing the current fiscal year shall be available for their stated purposes to support (1) Vietnamese and other free world forces in support of Vietnamese forces (2) local forces in Laos and Thailand; and for related costs, on such terms and conditions as the Secretary of Defense may determine: . . . Provided further, that nothing in clause (1) of the first sentence of this subsection shall be construed as authorizing the use of any such funds to support Vietnamese or other free world forces in actions designed to provide military support and assistance to the Government of Cambodia or Laos: Provided further that nothing contained in this section shall be construed to prohibit support of actions required to insure the safe and orderly withdrawal or disengagement of U.S. Forces from Southeast Asia, or to aid in the release of Americans held as prisoners of war.

This language was continued in all subsequent military authorization or appropriations acts. See Appropriations Authorization-Military Procurement Act, 1972, P.L. 92-156, 85 Stat. 423, November 17, 1971, Sec. 501; Military Procurement Act, 1973, P.L. 92-436, 86 Stat. 734, September 26, 1972, Sec. 601; Department of Defense Appropriation Act, 1973, P.L. 92-570, 86 Stat. 1184, October 26, 1972, Sec. 737.

In the Foreign Assistance Act, 1971, approved on February 7, 1972, the Congress expressly stated that limited foreign aid to Cambodia "shall not be construed as a commitment by the United States to Cambodia for its defense." P.L. 92-226, 22 U.S.C. § 2415(g). The Act recognized the existence of bombing in Cambodia, in language which both sides cite. The pertinent provisions of the Act read as follows:

Sec. 655. Limitations Upon Assistance to or for Cambodia.—(a) Notwithstanding any other provision of law, no funds authorized to be appropriated by this or any other law may be obligated in any amount in excess of $341,000,000 for the purpose of carrying out directly or indirectly any economic or military assistance, or any operation, project, or program of any kind, or for providing any goods, supplies, materials, equipment, services, personnel, or advisers in, to, for, or on behalf of Cambodia during the fiscal year ending June 30, 1972.

. . . . .

(c) No funds may be obligated for any of the purposes described in subsection (a) of this section in, to, for, or on behalf of Cambodia in any fiscal year beginning after June 30, 1972, unless such funds have been specifically authorized by law enacted after the date of enactment of this section. In no case shall funds in any amount in excess of the amount specifically authorized by law for any fiscal year be obligated for any such purpose during such fiscal year.

(d) The provisions of subsections (a) and (c) of this section shall not apply with respect to the obligation of funds to carry out combat air operations over Cambodia.

(e) After the date of enactment of this section, whenever any request is made to the Congress for the appropriation of funds for use in, for, or on behalf of Cambodia for any fiscal year, the President shall furnish a written report to the Congress explaining the purpose for which such funds are to be used in such fiscal year.

. . . . .

> Sec. 656. Limitations on United States Personnel and Personnel Assisted by United States in Cambodia. —The total number of civilian officers and employees of executive agencies of the United States Government who are citizens of the United States and of members of the Armed Forces of the United States (*excluding such members while actually engaged in air operations in or over Cambodia which originate outside Cambodia*) present in Cambodia at any one time shall not exceed two hundred. The United States shall not, at any time, pay in whole or in part, directly or indirectly, the compensation or allowances of more than eighty-five individuals in Cambodia who are citizens of countries other than Cambodia or the United States. For purposes of this section, "executive agency of the United States Government" means any agency, department, board, wholly or partly owned corporation, instrumentality, commission, or establishment within the executive branch of the United States Government. (Emphasis added).

On February 9, 1972, the President stated to Congress that North Vietnam continued to threaten the legitimate governments in Laos and Cambodia "in order to further its attacks on South Vietnam," and stated that "In Cambodia, operations are at the request of the Government and serve to relieve enemy pressures against Cambodia as well as South Vietnam." United States Foreign Policy for the 1970's: The Emerging Structure of Peace, 8 Presidential Documents 235, 343-45.

On April 18, 1972, testimony before the House of Representatives Committee on Armed Services stated that a significant portion of the Navy and Air Force incremental

war costs of $2,023,000,000 for fiscal 1972 "could be attributed to operations in Laos and Cambodia." Cong. Rec. 9173. Some information presented at that time was classified and made available for inspection only by members of Congress.

Events in 1973

On January 27, 1973, the parties participating in the Paris Conference on Vietnam signed an Agreement on Ending the War and Restoring Peace in Vietnam, which stated in Article 20(a):

> . . . The parties participating in the Paris Conference on Vietnam undertake to refrain from using the territory of Cambodia and the territory of Laos to encroach on the sovereignty and security of one another and of other countries.

The affidavit of the Assistant United States Attorney opposing the motion for summary judgment asserts that after January 27, 1973, despite a unilateral cessation of hostilities by the governments of Cambodia and the United States, "the North Vietnamese launched a general offensive in Cambodia, continuing the combat there. The military response of the United States continued."

In fact, there is evidence that air operations over Cambodia since January 27, 1973 have escalated sharply. A report on United States Air Operations in Cambodia prepared for the Subcommittee on United States Security Agreements and Commitments Abroad (April 1973—G.P.O.), states on page 7 that in the period February 16 through February 28, 1973, an average of twenty-three tactical air sorties a day and five B-52 sorties were flown in Cambodia. In the following two-week period, March 1-

March 15, an average of fifty-eight tactical and gunship sorties and twenty B-52 sorties were flown. Between March 16-March 31, an average of 184 tactical sorties and fifty-eight B-52 sorties were flown. A statistical summary submitted by the Department of Defense to the Senate Armed Services Committee on June 19, 1973 shows that in the period October 30, 1972-January 27, 1973, 936 combat sorties were flown over Cambodia and that in the period January 27, 1973-April 30, 1973, 12,136 sorties were flown.

The last American combat troops were withdrawn from South Vietnam on March 28, 1973 and the last known American prisoners of war were released on April 1, 1973.

Secretary of State Rogers on April 3, 1973, submitted a statement on "Presidential Authority to Continue U.S. Air Combat Operations in Cambodia" to the Senate Committee on Foreign Relations at hearings concerning the Department of State Appropriations Authorization for fiscal 1974. The statement asserted its view that

> the conflicts in Laos and Cambodia are closely related to the conflict in Vietnam and, in fact, are so interrelated as to be considered parts of a single conflict.

Hearings on S. 1248 and H.R. 5610, 93d Cong. 1st Sess. p. 452. It was further stated that the presence of North Vietnamese troops in Laos and Cambodia threatened the right of self-determination of the South Vietnamese people, which was guaranteed by the Paris Agreement, and that air strikes in Cambodia were not for the defense of Cambodia as such, but to enforce compliance with the Vietnam (cease-fire) Agreement. *Id.* 453.

Congressional Moves After the Repatriation of American Prisoners of War

The Defense Department sought authority in May 1973 to transfer $500 million to cover existing shortages of men and material. About $175 million was earmarked for Cambodian bombing operations. See 119 Cong.Rec. H 3449 (daily ed. May 8, 1973). On May 10, 1973, the House voted down the transfer authority by a vote of 219-188. 119 Cong. Rec. H 3561, 3592-93 (daily ed. May 10, 1973).

Immediately thereafter the House adopted the Long Amendment to the Second Supplemental Appropriations Bill H.R. 7447, which explicitly forbade the use of Defense Department funds for the Cambodian bombing. The amendment read:

> None of the funds herein appropriated to the Department of Defense under this Act shall be expended to support directly or indirectly combat activities in, over, or from off the shores of Cambodia by United States forces.

119 Cong.Rec. H 3593 (daily ed. May 10, 1973). The Long Amendment passed by a vote of 224-172. *Ibid.* at H 3598.

Thereafter the Senate adopted a broader amendment to H.R. 7447, barring the use of any and all funds theretofore appropriated for the Defense Department for the bombing of Cambodia. It was introduced by Senator Eagleton on May 29, 1973:

> Sec. 305. None of the funds herein appropriated under this Act or heretofore appropriated under any other Act may be expended to support directly or indirectly combat activities in, over or from off shores of Cambodia, or in or over Laos by United States forces.

119 Cong.Rec. S 9827 (daily ed. May 29, 1973). The Eagleton amendment was adopted by a vote of 63-19 on May 31, 1973. 119 Cong.Rec. S 10128 (daily ed. May 31, 1973).

Since the Eagleton amendment was more inclusive than the Long amendment, the measure went to a conference committee of the two houses. On June 25, 1973, the House receded and accepted the broader Eagleton amendment by a vote of 235 to 172. 119 Cong.Rec. H 5268 (daily ed. June 25, 1973). The House refused to adopt a proposed amendment to delay the effect of the Eagleton amendment. The vote was 204 to 204. *Ibid.* H 5274.

Thereafter on June 26, 1973, the Senate agreed to the conference report on H.R. 7447 containing the Eagleton amendment. The vote was 81 to 11. 119 Cong.Rec. S 12057 (daily ed. June 26, 1973). The bill was then sent to the President.

The President vetoed H.R. 7447 on June 27, 1973. The House voted 241 to 173 to override the veto—a majority of sixty-eight votes but short of the required two-thirds vote. 119 Cong.Rec. H 5487 (daily ed. June 27, 1973).

On the same day, the Senate voted to attach the Eagleton amendment to H.R. 8410, a bill to continue the existing increase in public debt through November 30, 1973. The amendment read as follows:

> Sec. 501. No funds heretofore or hereafter appropriated under any Act of Congress may be obligated or expended to support directly or indirectly combat activities in, over, or from off the shores of Cambodia or in or over Laos by United States forces.

119 Cong.Rec. S 12171 (daily ed. June 27, 1973). The amendment was adopted by a vote of 67 to 29. *Ibid.* at S

12173. Thereafter the debt limit bill with the Eagleton amendment was passed by a vote of 72 to 19. *Ibid.* at S 12220.

On June 26, 1973 the House also adopted two amendments to the Continuing Appropriations Resolution (H.J. Res. 636), barring funds for Cambodian bombing. Congressman Long introduced the following amendment:

> None of the funds under this joint resolution heretofore appropriated may be expended to support directly or indirectly combat activities in or over Cambodia or Laos or off the shores of Cambodia or Laos by United States forces.

Cong.Rec. H 5363 (daily ed. June 26, 1973). It passed by a vote of 218 to 194. *Ibid.* at H 5371. Congressman Addabbo introduced a similar amendment.

> Sec. 108. None of the funds under this Joint Resolution may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, Vietnam and South Vietnam or off the shores of Cambodia, Laos, North Vietnam and South Vietnam by United States forces without the express consent of Congress.

It passed by a vote of 240 to 172. *Ibid.* at H 5373.

Faced with the dilemma of the President set upon vetoing any bill containing riders cutting off funds for Cambodian military operations and the urgency of providing funds for the operation of the federal government, Senator Fulbright on June 29, 1973, after conferences with White House representatives, introduced the following amendment to the Continuing Appropriations Resolution (H.J. Res. 636):

> Sec. 109. Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein, heretofore or hereafter appropriated may be obligated or expended to finance the involvement of United States military forces in hostilities in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia.

119 Cong.Rec. S 12560 (daily ed. June 29, 1973). The Senate voted to adopt the Fulbright amendment 64 to 26. *Ibid.* S 12580. The Senate then voted to delete the earlier Eagleton amendment from the Continuing Appropriations Resolution. *Ibid.* S 12581.

The House refused to pass S 109 as worded and in conference S 108 was adopted. 119 Cong.Rec. No. 104 (daily ed. June 30, 1973). The Conference Report was approved by the House on June 30. *Ibid.* at H 5781. H.J. Res. 636, the Joint Resolution Continuing Appropriations for Fiscal 1974, Public Law 93-52, was signed into law by the President on July 1 and provided:

> Sec. 108. Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

On July 1, the President also signed into law H.R. 9055, the Second Supplemental Appropriations Act, 1973, Public Law 93-50. The Act includes the following provision:

> Sec. 307. None of the funds herein appropriated under this Act may be expended to support directly or in-

directly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam by United States forces, *and after August 15, 1973, no other funds heretofore appropriated, under any other Act may be expended for such purpose.* (Emphasis added.)

Other Facts

The defendants do not disagree with plaintiffs' contention that all ground combat troops were withdrawn from Indochina on March 28, 1973. There is reference in the papers to a few members of the armed forces stationed as guards to the Embassy in Saigon, but no assertion that they are there to continue the Vietnam war.

The complete repatriation of all known American prisoners of war is established by testimony before Congress quoted in plaintiffs' papers. Frank A. Sieverts, Special Assistant to the Deputy Secretary of State for Prisoner of War/Missing in Action Matters, in testimony before the National Security Policy and Scientific Developments Subcommittee of the House Committee on Foreign Affairs, May 31, 1973, stated:

> It should be noted that there is no indication from these debriefings [of returning POW's] that any American personnel continue to be held in Indochina. All American prisoners known to any of our returned POW's have either been released or been listed by the communist authorities as having died in captivity. Returnees with whom I have talked, including those who appeared before this Subcommittee May 23, are clear in their belief that no U.S. prisoners continue to be held.

Defendants assert that the complete repatriation of prisoners of war is not an undisputed fact, but they have presented no evidence that there are any such prisoners remaining in North Vietnam or anywhere in Indochina. There remain, however, over 1,250 members of the armed forces listed as missing in action, who have not been located or officially declared to have died.

Plaintiffs and the *amici* assert that continuing hostilities in Cambodia do not represent activities of North Vietnamese troops, but a civil war between Khmer insurgents and the official government of Cambodia.

Plaintiffs and the *amici* also assert that continued U.S. bombing in Cambodia is causing the death and maiming of many civilians.

Defendants stated on oral argument that if summary judgment is denied, they would propose to offer testimony from Secretary of State Rogers, Secretary of Defense Schlesinger, and Dr. Kissinger concerning the necessity for the air operations and the importance of continuing bombing in Cambodia because of continuing confidential negotiations for a Cambodian cease-fire. No other offer of proof has been made on behalf of the defendants.

On July 23, 1973, the government informed the court that statistical data reflecting bombing activities in Cambodia between March 1969 and April 1970 had been "declassified" and were published in revised Table concerning fighter-bomber munitions and B-52 munitions in the Congressional Record for July 18, 1973. Defendants do not contend, however, that these facts were known to Congress before July 1, 1973. The court does not find that these facts are relevant to the issues dealt with herein.

Discussion

1. *Legal Standards*

The Court of Appeals of this circuit has spoken several times concerning earlier aspects of the Vietnam hostilities.

The teaching of DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), and Berk v. Laird, 429 F.2d 302 (2d Cir. 1970), is that the question of the balance of constitutional authority to declare war, as between the executive and legislative branches, is not a political question and hence presents a justiciable issue, if plaintiffs can succeed in showing that there are manageable standards to resolve the controversy.

The Court of Appeals in Berk v. Laird, *supra*, 429 F.2d at 305, stated that there might be manageable standards to determine whether "prolonged foreign military activities without any significant congressional authorization" might violate

> a discoverable standard calling for *some* mutual participation by Congress in accordance with Article I, section 8. (Emphasis from the original.)

This court on remand found that Congress in appropriations bills from 1965 through 1969 had shown "its continued support of the Vietnam action" and that Congress' choice of appropriations bills rather than a formal declaration of war to effectuate its intent involved a political question which did not prevent the finding that the fighting in Vietnam was authorized by Congress and that such fighting was not a usurpation of power by either of the Presidents who had been in office after 1964. Berk v. Laird, *supra*, 317 F.Supp. at 726, 728-731.

Nevertheless, appropriations bills do not necessarily indicate an open-ended approval of all military operations which may be conducted. See Mitchell v. Laird, 476 F.2d 533, 538 (D.C. Cir. 1973); Note, Congress, The President and the Power to Commit Forces to Combat, 81 Harv.L. Rev. 1171, 1802 (1968).

In affirming this court's *Berk* decision and Judge Dooling's similar *Orlando* decision, the Court of Appeals stated the test of whether there were manageable standards for adjudication as being "whether there is any action by the Congress sufficient to authorize or ratify the military activity in question." Orlando v. Laird, *supra*, 443 F.2d at 1042. It found that there was evidence of "an abundance of *continuing* mutual participation in the prosecution of the war." 443 F.2d at 1042 (Emphasis added).

More recently in DaCosta v. Laird, *supra*, 471 F.2d at 1151, the Court of Appeals dealt with the question "whether within the context of a lawful war, the President's order to mine the harbors of North Vietnam was properly authorized." It held in that instance (at p. 1155) that judges could not determine "whether a specific military operation constitutes an 'escalation' of the war or is merely a new tactical approach within a continuing strategic plan." However, it added (at p. 1156):

> In so stating, however, we specifically do not pass on the point urged by appellant whether a radical change in the character of war operations—as by an intentional policy of indiscriminate bombing of civilians without any military objective—might be sufficiently measurable judicially to warrant a court's consideration, i.e., might contain a standard which we seek in this record and do not find.

The court finds no evidence of intentional bombing of civilians, but the mining of North Vietnam harbors was a part of the war in Vietnam. If bombing in Cambodia is not part of the war in Vietnam, there may be a standard available here which the Court of Appeals did not find in *DaCosta*.

Therefore the manageable standard which this court must apply is the existence of Congressional authority for the present bombing activities over Cambodia, now that American forces have been withdrawn and prisoners of war have been repatriated. In order to be entitled to relief, plaintiffs must show, under this standard, and the test of "continuing mutual participation" set forth in *Orlando*, either that Congress has not participated with the executive in the authorization of the hostilities in Cambodia or that Congress has terminated any such authorization.

2. *The Extent of Congressional Authorization of Cambodian Hostilities*

Cambodia was not mentioned in any of the appropriations bills referred to in *Berk*. The 1964 appropriations bill for the Department of Defense (P.L. 89-18, 79 Stat. 109) referred to "military activities in Southeast Asia." See 317 F.Supp. at 724. But the Department of Defense Appropriations Act for 1968 (P.L. 90-96, 81 Stat. 231, 248, § 639(a)) made appropriations available to support only

> (1) Vietnamese and other free world forces in Vietnam, (2) local forces in Laos and Thailand; and for related costs;

and subsequent authorization and appropriations bills used similar language. See 317 F.Supp. at 726-27.

Ever since the hostilities in Cambodia were announced by the President in April 1970, the appropriations bills have all contained the Fulbright proviso forbidding military support to the government of Cambodia, except in support of actions to insure the safe withdrawal of American forces or to aid in the release of prisoners of war. *Supra*, p. 555.

The Mansfield amendment referred also to the desirability of an accounting for all Americans missing in action, but this was only in relation to the establishment of a final date for withdrawal of United States military forces from Indochina. *Supra*, pp. 555-556. No Congressional purpose or authorization has been shown for the bombing of Cambodia in aid of persons missing in action, after all known prisoners of war have been released. Other actions by Congress specifically denied any commitment by the United States to Cambodia in its defense (*supra*, pp. 555-556), and the Defense Appropriation Act for 1972, approved a month after the Mansfield amendment, referred only to the withdrawal of United States forces and the release of prisoners of war. *Supra*, pp. 556-557.

The defendants point to the language in the Foreign Assistance Act of 1971, Section 655(d), excluding members of the armed forces engaged in air operations over Cambodia from the limitation on United States personnel in Cambodia, as an authorization for continued bombing. However, the Senate report concerning this bill indicates that the authorization was intended to be correlative with the Fulbright proviso, for it stated (Sen. Rep. No. 92-431, Nov. 8, 1971):

> Section 655 specifically excepts all combat air operations over Cambodia from this ceiling. This exception covers all United States and South Vietnamese combat

> air operations as well as combat air operations by other countries which involve the expenditure of U.S. funds. This exception is included because of the view of some Committee members that monetary limitations on air operations in Cambodia might jeopardize the continuing withdrawal of U.S. forces from Vietnam.

U.S. Code Cong. & Admin. News, 1972, p. 1897.

Any inference flowing from the negatively phrased exception in Section 656 of the same act would be too indirect a route for Congress to express its will to continue a bombing operation which it had repeatedly questioned. The court does not find such authorization in the Foreign Assistance Act.

The documents described in the statement of facts indicate that Congress did not acquiesce in the Presidential statements that the Indochina war was all of one piece, but rather gave only limited authorization for continued hostilities in Cambodia.

Applying principles of the law of agency, as this court did in the *Berk* case, 317 F.Supp. at 728, it is the usual rule that the principal (Congress) may limit the duration of any authorization which it gives to the agent (the Executive). Section 38 of the Agency Restatement of the Law, Second (1958) states:

> § 38. Interpretation as to Duration of Authority
>
> Authority exists only during the period in which, from the manifestations of the principal and the happening of events of which the agent has notice, the agent reasonably believes that the principal desires him to act.

In considering the continued bombing of Cambodia, the removal of American forces and prisoners of war from Vietnam represents a basic change in the situation, which must be considered in determining the scope and duration of any Congressional authorization. The bombing of Cambodia in July 1973 is not "the sort of tactical decision traditionally confided to the Commander-in-Chief in the conduct of armed conflict," as once described by then Assistant Attorney General Rehnquist. Rehnquist, The Constitutional Issues, Administrative Position in 3 Falk, The Vietnam War and International Law, 163, 173 (1972).

The Congressional action before and after the beginning of hostilities in Cambodia does not include authorization to bomb Cambodia in order to achieve a Cambodian cease-fire or even to protect the Vietnamese cease-fire as urged by defendants. The extent of the power granted by Congress depends on the language used by Congress, not on the President's statements to Congress.

An emergency does not create power unless Congress has granted it. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629, 72 S.Ct. 863, 886, 96 L.Ed. 1153 (1952). The Constitution provides (Article II, Section 3) that the President shall recommend to the Congress "such Measures as he shall deem necessary and expedient," and that "he shall take Care that the Laws be faithfully executed." Non-action by Congress does not constitute an implied grant of power. Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959).

The question here is not the one posed by the government, whether aerial action in Cambodia is the termination of a continuing war or the initiation of a new and distinct war; but whether Congress has authorized bombing in Cam-

bodia after the withdrawal of American troops from Vietnam and the release of prisoners of war.

3. *The Effect of the July 1, 1973 Proviso*

Authority to bomb Cambodia was not granted by the provisions adopted by both Houses of Congress on June 29, 1973 and signed by the President on July 1, 1973, forbidding any expenditure of funds in connection with hostilities over Cambodia after August 15, 1973. This is made clear by the statements of Senator Fulbright and others during the debate in the Senate, where Senator Fulbright stated:

> The acceptance of an August 15 cut off date should in no way be interpreted as recognition by the committee of the President's authority to engage U.S. forces in hostilities until that date. The view of most members of the committee has been and continues to be that the President does not have such authority in the absence of specific congressional approval.

119 Cong.Rec. S 12560 (daily ed. June 29, 1973).

He reiterated this point in colloquy with Senator Eagleton:

> Mr. Eagleton: I want to inquire as to what this resolution includes. What does it prevent within the next 45 days? Does it permit continued bombing between now and August 15?
>
> Mr. Fulbright: As I have said, I do not regard him as having the right to do this. He has the power to do it. And unless we have something like this, the only sanction we have here is to impeach him. And I do not think that is practical. I do not recommend it. I know of no other alternative.

Mr. Eagleton: Would it permit the bombing of North and South Vietnam until August 15?

Mr. Fulbright: I do not think it is legal or constitutional. But whether it is right to do it or not, he has done it. He has the power to do it because under our system there is not any easy way to stop him.

I do not want my statement to be taken to mean that I approve of it or think that it is constitutional or legal for him to do it. He can do it. He has done it. Do I make myself clear?

Mr. Eagleton: In a way yes, and in a way no. If we adopt this resolution, the President will continue to bomb Cambodia. That means quite simply that we will sanction it, does it not?

Mr. Fulbright: We do not sanction it. It does not mean that we approve of the bombing. This is the best way to stop it. I have never approved of it. And I do not wish my answer to indicate that I approve of the bombing, because I do not.

Mr. Eagleton: But the President will exercise a power to bomb in Indochina within the next 45 days, is that correct? A power that will now be sanctioned by our action?

Mr. Fulbright: The President has the power to do a lot of things of which I do not approve.

Mr. Eagleton: He will exercise that power, and whether he exercises that power wisely, we know that within the next 45 days he will exercise a right to bomb Cambodia—a right given him by the Congress of the United States.

> Mr. Fulbright: I do not consider that he has the right to do it.

119 Cong.Rec. S 12562 (daily ed. June 29, 1973).

This is not a situation where the views of a few members of Congress, holding attitudes antithetical to the majority, are being proffered to defeat what Congress had intended to be a grant of authority. There is no indication of a contrary majority sentiment. Majorities in both Houses had previously made plain that they were opposed to any continuation of bombing in Cambodia, and they included an August 15 cutoff date merely in order to avoid the veto which had met their earlier efforts.

The defendants urge that Congress' will as expressed through bills which were not enacted cannot be used as a factor in interpreting the July 1 legislation. But this contention misconstrues the basic issue. The question is not whether Congress has affirmatively acted to disavow participation, but whether Congress has acted to authorize the continuation of hostilities in Cambodia. While Congress can exercise its war-making power through measures other than an express declaration of war, courts should not easily infer the exercise of such a grave responsibility. Legislative history as evidenced through bills that were vetoed is relevant to a judicial inquiry of whether or not Congress intended to participate in the military campaign under challenge.

It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized.

In order to avoid a constitutional crisis that would have resulted in a temporary shutdown of vital federal activities (including issuance of monthly Social Security checks), due to lack of funds for the new fiscal year, Congress agreed to hold off any action affirmatively cutting off funds for military purposes until August 15, 1973.

This does not reach the question whether such activities had previously been authorized.

The period from now until August 15 is relatively short, the court necessarily having taken several weeks in studying the matter and preparing this memorandum. However, the court cannot say that the Cambodian and American lives which may be lost during the next three weeks are so unimportant that it should defer action in this case still further.

There are no disputed issues of material fact. The issues relate to the interpretation of Congressional acts.

Even if part of the fighting in Cambodia is being conducted by North Vietnamese troops rather than by Khmer insurgents, the court has found that there is no Congressional authorization to fight in Cambodia after the withdrawal of American troops and the release of American prisoners of war. Even though the executive and the military may consider Cambodian bombing an effective means of enforcing paragraph 20 of the Paris Agreement of January 27, 1973, it does not appear that Congress has given its authority for such acts.

There is no indication that any of the classified information mentioned by the government will affect the interpretation of the Congressional acts or that the testimony of the officials suggested as witnesses will do so. The reasons which may have led the executive to continue bombing in

Cambodia are not decisive, in the absence of continuing authority from Congress to do so.

There is nothing in the case of Gilligan v. Morgan, —— U.S. ——, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) cited to the court during the typing of the opinion, which is contrary to what has been written above. The Supreme Court in *Gilligan* held that it would be inappropriate for a judge to evaluate the appropriateness of the "training, weaponing and orders" of the Ohio National Guard and establish standards to control the actions of the National Guard. Pp. ——, ——, 93 S.Ct. 2440. What is involved in this case is not the training or tactics of American forces, but whether Congress has authorized the Cambodian bombing. That question is capable of judicial resolution, under the cases cited above, by applying traditional processes of statutory construction.

The court will therefore permit the addition of Captain Donald E. Dawson as plaintiff, and will grant summary judgment for declaratory and equitable relief as set forth in the accompanying judgment, but will postpone the effective date of the injunction until Friday in order to permit the defendants to apply for a stay from the Court of Appeals.

It is ordered that Captain Donald E. Dawson be added as a plaintiff, that plaintiffs have leave to file and serve a second amended complaint in the form proposed, and that the caption be amended accordingly.

Justice Marshall's Opinion Denying Application to Vacate Stay

SUPREME COURT OF THE UNITED STATES

No. A-150

Elizabeth Holtzman et al.
v.
James R. Schlesinger.

On Application to Vacate Stay.

[August 1, 1973]

MR. JUSTICE MARSHALL, Circuit Justice.

This case is before me on an application to vacate a stay entered by a three-judge panel of the United States Court of Appeals for the Second Circuit. Petitioners, a Congresswoman from New York and several air force officers serving in Asia, brought this action to enjoin continued United States air operations over Cambodia. They argue that such military activity has not been authorized by Congress and that, absent such authorization, it violates Article I, § 8, cl. 11 of the Constitution.[1] The United States District Court agreed and, on petitioners' motion for summary judgment, permanently enjoined respondents, the Secretary of Defense, the Acting Secretary of the Air Force, and the Deputy Secretary of Defense, from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia." However, the effective date of the injunction was delayed until July 27, 1973, in order to give respondents an opportunity to apply to the Court of Appeals for a stay pending appeal. Respondents promptly applied for such a stay, and the application

[1] Article I, § 8, cl. 11 provides: "The Congress shall have power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

was granted, without opinion, on July 27.[2] Petitioners then filed this motion to vacate the stay. For the reasons stated below, I am unable to say that the Court of Appeals abused its discretion in staying the District Court's order. In view of the complexity and importance of the issues involved and the absence of authoritative precedent, it would be inappropriate for me, acting as a single Circuit Justice, to vacate the order of the Court of Appeals.

I

Since the facts of this dispute are on the public record and have been exhaustively canvassed in the District Court's opinion, it would serve no purpose to repeat them in detail here. It suffices to note that publicly acknowledged United States involvement in the Cambodian hostilities began with the President's announcement an April 30, 1970,[3] that this country was launching attacks "to clean out major enemy sanctuaries on the Cambodian-Vietnam border,"[4] and that American military action in that country has since met with gradually increasing congressional resistance.

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[2] At the same time, the Court of Appeals ordered an expedited briefing schedule and directed that the appeal be heard on August 13. In the course of oral argument on the stay, Acting Chief Judge Feinberg noted that either side could submit a motion to further advance the date of argument. Counsel for petitioners indicated during argument before me that he intends to file such a motion promptly. Moreover, the Solicitor General has made representations that respondents will not oppose the motion and that, if it is granted, the case could be heard by the middle of next week. This case poses issues of the highest importance, and it is, of course, in the public interest that those issues be resolved as expeditiously as possible.

[3] It appears, however, that covert American activity substantially predated the President's April 30 announcement. See, *e. g.*, of the New York Times, July 15, 1973, at 1, col. 1 ("Cambodian Raids Reported Hidden before '70 Foray.").

[4] The Situation in Southeast Asia, 6 Presidential Documents 596, 598.

Although United States ground troops had been withdrawn from the Cambodian theater by June 30, 1970, in the summer of that year, Congress enacted the so-called Fulbright Proviso prohibiting the use of funds for military support to Cambodia.[5] The following winter, Congress reenacted the same limitation with the added proviso that "nothing contained in this section shall be construed to prohibit support of actions required to insure the safe and orderly withdrawal or disengagement of U. S. Forces from Southeast Asia, or to aid in the release of Americans held prisoners of war." 84 Stat. 2037. These provisions have been attached to every subsequent military appropriations act.[6] Moreover, in the Special Foreign Assistance Act of 1971, Congress prohibited the use of funds to support American ground combat troops in Cambodia under any circumstances and expressly provided that "[m]ilitary and economic assistance provided by the United States to Cambodia . . . shall not be construed as a commitment by the United States to Cambodia for its defense."[7]

Congressional efforts to end American air activities in Cambodia intensified after the withdrawal of American ground troops from Vietnam and the return of American prisoners of war. On May 10, 1973, the House of Representatives refused an administration request to authorize the transfer of $175 million to cover the costs of the Cambodian bombing. See 119 Cong. Rec. H. 3561, 3592–3593 (daily ed. May 10, 1973). Shortly thereafter, both Houses of Congress adopted the so-called Eagleton Amendment prohibiting the use of any funds for Cam-

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[5] The Fulbright Proviso states:

"Nothing [herein] shall be construed as authorizing the use of any such funds to support Vietnamese or other free world forces in actions designed to provide military support and assistance to the Government of Cambodia or Laos." 84 Stat. 910.

[6] See 85 Stat. 423; 85 Stat. 716; 86 Stat. 734; 86 Stat. 1184.

[7] 84 Stat. 1943. See also 22 U. S. C. § 2416 (g).

bodian combat operations.[8] Although this provision was vetoed by the President, an amendment to the Continuing Appropriations Resolution was ultimately adopted and signed by the President into law which stated:

> "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." H. J. Res. 636, The Joint Resolution Continuing Appropriations for Fiscal 1974, Pub. L. 93-52.[9]

II

Against this background, petitioners forcefully contend that continued United States military activity in Cambodia is illegal. Specifically, they argue that the President is constitutionally disabled in nonemergency situations from exercising the warmaking power in the absence of some affirmative action by Congress. See, *e. g.*, *Bas* v. *Tingy*, 4 Dall. 37 (1800); *Talbot* v. *Seeman*, 1 Cranch 1 (1801); *Mitchell* v. *Laird*, — U. S. App. D. C. —, 476 F. 2d 533, 537-538 (1973); *Orlando* v.

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[8] The Eagleton amendment provided:

"None of the funds herein appropriated under this Act or heretofore appropriated under any other Act may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia, or in or over Laos by United States forces."

[9] The President contemporaneously signed the Second Supplemental Appropriations Act of 1973, Pub. L. 93-50, which contained a provision stating that

"[n]one of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose."

Laird, 443 F. 2d 1039, 1042 (CA2 1971). Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). In light of the Fulbright Proviso, petitioners take the position that Congress has never given its assent for military activity in Cambodia once American ground troops and prisoners of war were extricated from Vietnam.

With the case in this posture, however, it is not for me to resolve definitively the validity of petitioners' legal claims. Rather, the only issue now ripe for decision is whether the stay ordered by the Court of Appeals should be vacated. There is, to be sure, no doubt that I have the power, as a single Circuit Justice, to dissolve the stay. See *Meredith* v. *Fair*, 83 S. Ct. 10 (1962) (Black, J., Circuit Justice); 28 U. S. C. §§ 1651, 2101 (f). But at the same time, the cases make clear that this power should be exercised with the greatest of caution and should be reserved for exceptional circumstances. Cf. *Aberdeen & Rockfish Railroad Co.* v. *Students Challenging Regulatory Agency Procedures*, 409 U. S. 1207, 1218 (1972) (BURGER, C. J., Circuit Justice).

Unfortunately, once these broad propositions are recognized, the prior cases offer little assistance in resolving this issue, which is largely *sui generis*. There are, of course, many cases suggesting that a Circuit Justice should "balance the equities" when ruling on stay applications and determine on which side the risk of irreparable injury weighs most heavily. See, *e. g.*, *Long Beach Federal Sav. & Loan Assn.* v. *Federal Home Loan Bank*, 76 S. Ct. 32 (1955) (DOUGLAS, J., Circuit Justice); *Board of Educ.* v. *Taylor*, 82 S. Ct. 10 (BRENNAN, J., Circuit Justice). *Socialist Labor Party* v. *Rhodes*, 89 S. Ct. 3 (1968) (STEWART, J., Circuit Justice).

But in this case, the problems inherent in attempting to strike an equitable balance between the parties are virtually insurmountable. On the one hand, petitioners assert that if the stay is not vacated, the lives of thou-

sands of Americans and Cambodians will be endangered by the Executive's arguably unconstitutional conduct. Petitioners argue, not implausibly, that if the stay is not vacated, American pilots will be killed or captured, Cambodian civilians will be made refugees, and the property of innocent bystanders will be destroyed.

Yet on the other hand, respondents argue that if the bombing is summarily halted, important foreign policy goals of our government will be severely hampered. Some may greet with considerable skepticism the claim that vital security interests of our country rest on whether the Air Force is permitted to continue bombing for a few more days, particularly in light of respondents' failure to produce affidavits from any responsible government official asserting that such irreparable injury will occur.[10] But it cannot be denied that the assessment of such injury poses the most sensitive of problems, about which Justices of this Court have little or no information or expertise. While we have undoubted authority to judge the legality of executive action, we are on treacherous ground indeed when we attempt judgments as to its wisdom or necessity.[11]

The other standards utilized for determining the propriety of a stay are similarly inconclusive. Opinions by Justices of this Court have frequently stated that lower court decisions should be stayed where it is likely that four Members of this Court would vote to grant a writ of certiorari. See, *e. g.*, *Edwards* v. *New York*, 76 S. Ct. 1058 (1956) (Harlan, J., Circuit Justice); *Appalachian Power Co.* v. *American Institute of C. P. A.*, 80 S. Ct. 16

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[10] While respondents offered to produce testimony at trial by high government officials as to the importance of the bombing, no affidavits by such officials alleging irreparable injury in conjunction with the stay application were offered.

[11] For similar reasons, it would be a formidable task to judge where the public interest lies in this dispute, as courts traditionally do when determining the appropriateness of a stay. See, *e. g.*, *O'Brien* v. *Brown*, 409 U. S. 1, 3 (1972).

(1959) (BRENNAN, J., Circuit Justice); *English* v. *Cunningham*, 80 S. Ct. 18 (1959) (Frankfurter, J., Circuit Justice). But to some extent, at least, this standard reflects a desire to maintain the status quo in those cases which the Court is likely to hear on the merits. See, *e. g.*, *In re Bart*, 82 S. Ct. 675 (1962) (Warren, C. J., Circuit Justice); *McGee* v. *Eyman*, 83 S. Ct. 230 (1962) (DOUGLAS, J., Circuit Justice). This case is unusual in that regardless of what action I take, it will likely be impossible to preserve this controversy in its present form for ultimate review by this Court. Cf. *O'Brien* v. *Brown*, 401 U. S. 1, 9–10 (1972) (MARSHALL, J., dissenting). On August 15, the statutory ban on Southeast Asian military activity will take effect, and the contours of this dispute will then be irrevocably altered. Hence, it is difficult to justify a stay for purpose of preserving the status quo, since no action by this Court can freeze the issues in their present form.[12]

To some extent, as well, the "four-vote" rule reflects the policy in favor of granting a stay only when the losing party presents substantial contentions which are likely to prevail on the merits. See, *e. g.*, *O'Brien* v. *Brown*, *supra*; *Rosenberg* v. *United States*, 346 U. S. 273 (DOUGLAS, J., Circuit Justice); *Railway Express Agency* v. *United States*; 82 S. Ct. 466 (1962) (Harlan, J., Circuit Justice); *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 396 U. S. 1201 (1969) (Black, J., Circuit Justice). In my judgment, petitioners' contentions in this case are far from frivolous and may well ultimately prevail. Although tactical decisions as to the conduct of an ongoing war may present political questions which the federal courts lack jurisdiction to decide, see, *e. g.*,

[12] I do not mean to suggest that this dispute will necessarily be moot after August 15. That is a question which is not now before me and upon which I express no views. Moreover, even if the August 15 fund cut-off does moot this controversy, petitioners may nonetheless be able to secure a Court of Appeals determination on the merits before August 15. See n. 2, *supra*.

DaCosta v. *Laird*, 471 F. 2d 1146 (CA2 1973), and although the courts may lack the power to dictate the form which congressional assent to warmaking must take, see *e. g.*, *Massachusetts* v. *Laird*, 451 F. 2d 26 (CA1 1971); *Mitchell* v. *Laird*, — U. S. App. D. C. —, 476 F. 2d 533 (1973), there is a respectable and growing body of lower court opinion holding that Art. I, § 8, cl. 11, imposes some judicially managable standards as to congressional authorization for warmaking, and that these standards are sufficient to make controversies concerning them justiciable. See *Mitchell* v. *Laird*, *supra*; *DaCosta* v. *Laird*, *supra*; *Orlando* v. *Laird*, 443 F. 2d 1039 (CA2 1971); *Berk* v. *Laird*, 429 F. 2d 302 (CA2 1970).

Similarly, as a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval—except, perhaps in the case of a pressing emergency or when the President is in the process of extricating himself from a war which Congress once authorized. At the very beginning of our history, Mr. Chief Justice Marshall wrote for a unanimous Court that

> "The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guide in this inquiry. It is not denied . . . that Congress may authorize general hostilities, in which case the general laws of war apply in our situation, or partial hostilities, in which case the laws of war, so far as they may actually apply to our situation, must be noticed." *Talbot* v. *Seeman*, 1 Cranch 1, 18 (1801).

In my judgment, nothing in the 172 years since those words were written alter that fundamental constitutional postulate. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

A fair reading of Congress' actions concerning the war in Cambodia may well indicate that the legislature has authorized only "partial hostilities"—that it has never given its approval to the war except to the extent that it was necessary to extricate American troops and prisoners from Vietnam. Certainly, this seems to be the thrust of the Fulbright Proviso.[1] Moreover, this Court could easily conclude that after the Paris Peace Accords, the Cambodian bombing is no longer justifiable as an extension of the war which Congress did authorize and that the bombing is not required by the type of pressing emergency which necessitates immediate presidential response.

Thus, if the decision were mine alone, I might well conclude on the merits that continued American military operations in Cambodia are unconstitutional. But the

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[1] The Solicitor General vigorously argues that by directing that Cambodian operations cease on August 15, Congress implicitly authorized their continuation until that date. But while the issue is not wholly free from doubt, it seems relatively plain from the face of the statute that Congress directed its attention solely to military actions after August 15, while expressing no view on the propriety of on-going operations prior to that date. This conclusion gains plausibility from the remarks of the sponsor of the provision—Senator Fulbright—on the Senate floor:

"The acceptance of an August 15 cut off date should in no way be interpreted as recognition by the committee of the President's authority to engage U. S. forces in hostilities until that date. The view of most members of the committee has been and continues to be that the President does not have such authority in the absence of specific congressional approval." 119 Cong. Rec. S. 12560 (Daily ed. June 29, 1973).

See also *id.*, at S. 12562.

While it is true that some Senators declined to vote for the proposal because of their view that it did implicitly authorize continuation of the war until August 15, see *id.*, at S. 12586 (Remarks of Sen. Eagleton); S. 12564 (remarks of Sen. Bayh); S. 12572 (remarks of Sen. Muskie), it is well established that speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the act in question.

Supreme Court is a collegial institution, and its decisions reflect the views of a majority of the sitting Justices. It follows that when I sit in my capacity as a Circuit Justice, I act not for myself alone but as a surrogate for the entire Court, from whence my ultimate authority in these matters derives. A Circuit Justice therefore bears a heavy responsibility to conscientiously reflect the views of his Brethren as best he perceives them, cf. *Meridith* v. *Fair*, 83 S. Ct. 10, 11 (1962) (Black, J., Circuit Justice), and this responsibility is particularly pressing when, as now, the Court is not in session.

When the problem is viewed from this perspective, it is immeasurably complicated. It must be recognized that we are writing on an almost entirely clean slate in this area. The stark fact is that although there have been numerous lower court decisions concerning the legality of the War in Southeast Asia, this Court has never considered the problem, and it cannot be doubted that the issues posed are immensely important and complex. The problem is further complicated by the July 1, 1973, Amendment to the Continuing Appropriations Resolution providing that "on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States Military forces in or over or from all the Shores of North Vietnam, South Vietnam, Laos or Cambodia." This, it is urged, is the crux of this case and there is neither precedent nor guidelines toward any definitive conclusion as to whether this is or is not sufficient to order the bombings to be halted prior to August 15.

Lurking in this suit are questions of standing, judicial competence, and substantive constitutional law which go to the roots of the division of power in a constitutional democracy. These are the sort of issues which should not be decided precipitously or without the benefit of proper consultation. It should be noted, moreover, that since the stay below was granted in respondents' favor,

the issue here is not whether there is some possibility that petitioners will prevail on the merits, but rather whether there is some possibility that respondents will so prevail. In light of the uncharted and complex nature of the problem, I am unwilling to say that that possibility is nonexistent.

Finally, it is significant that although I cannot know with certainty what conclusion my Brethren would reach, I do have the views of a distinguished panel of the Court of Appeals before me. That panel carefully considered the issues presented and unanimously concluded that a stay was appropriate. Its decision, taken in aid of its own jurisdiction, is entitled to great weight. See, *e. g.*, *United States ex rel. Knauff* v. *McGrath* (Jackson, J., Circuit Justice) (unreported opinion); *Braswick & Co.* v. *United States*, 75 S. Ct. 912 (1955) (Harlan, J., Circuit Justice). In light of the complexity and importance of the issues posed, I cannot say that the Court of Appeals abused its discretion.

When the final history of the Cambodian War is written, it is unlikely to make pleasant reading. The decision to send American troops "to distant lands to die of foreign fevers and foreign shot and shell," *New York Times* v. *United States*, 403 U. S. 713, 717 (1972) (Black, J., concurring), may ultimately be adjudged to have not only been unwise but also unlawful.

But the proper response to an arguably illegal action is not lawlessness by judges charged with interpreting and enforcing the laws. Down that road lies tyranny and repression. We have a government of limited powers, and those limits pertain to the Justices of this Court as well as to Congress and the Executive. Our Constitution assures that the law will ultimately prevail, but it also requires that the law be applied in accordance with lawful procedures.

In staying the judgment of the District Court, the Court of Appeals agreed to hear the appeal on its merits on August 13 and advised petitioners to apply to that

panel for an earlier hearing before that date. It is, therefore, clear to me that this highly controversial constitutional question involving the other two branches of this Government must follow the regular appellate procedures on the accelerated schedule as suggested by the Court of Appeals.

In my judgment, I would exceed my legal authority were I, acting alone, to grant this application. The application to vacate the stay entered below must therefore be

Denied.

Justice Douglas' Opinion Vacating Stay

SUPREME COURT OF THE UNITED STATES

No. A-150

Elizabeth Holtzman et al.
v.
James R. Schlesinger et al.
On Reapplication to Vacate Stay.

[August 4, 1973]

Opinion of MR. JUSTICE DOUGLAS.

My Brother MARSHALL, after a hearing, denied this application which in effect means that the decision of the District Court holding that the bombing of Cambodia is unconstitutional is stayed pending hearing on the merits before the Court of Appeals.

Application for stay denied by one Justice may be made to another. We do not, however, encourage the practice; and when the Term starts, the Justices all being in Washington, D. C., the practice is to refer the second application to the entire Court. That is the desirable practice to discourage "shopping around."

When the Court is in recess that practice cannot be followed, for the Justices are scattered. Yakima, Washington, where I have scheduled the hearing, is nearly 3,000 miles from Washington, D. C. Group action by all Members is therefore impossible.

I approached this decision, however, with a feeling of great deference to the judgment of my Brother MARSHALL, realizing that while his decision is not binding on me it is one to which I pay the greatest deference.

My Brother MARSHALL accurately points out that if the foreign policy goals of this Government are to be weighed the Judiciary is probably the least qualified branch to weigh them. He also states that if stays by judicial officers in cases of this kind are to be vacated the

circumstances must be "exceptional." I agree with those premises, and I respect the views of those who share my Brother MARSHALL's predilections.

But this case in its stark realities involves the grim consequences of a capital case. The classic capital case is whether Mr. Lew, Mr. Low, or Mr. Lucas should die. The present case involves whether Mr. X (an unknown person or persons) should die. No one knows who they are. They may be Cambodian farmers whose only "sin" is a desire for socialized medicine to alleviate the suffering of their families and neighbors. Mr. X may be the American pilot or navigator who drops a ton of bombs on a Cambodian village. The upshot is that we know that someone is about to die.

Since that is true I see no reason to balance the equities and consider the harm to our foreign policy if one or a thousand more bombs do not drop. The reason is that we live under the Constitution and in Art. I, § 8, it gives to Congress the power to "declare War." The basic question on the merits is whether Congress within the meaning of Art. I, § 8, has "declared war" on Cambodia.

It has become popular to think the President has that power to declare war. But there is not a word in the Constitution that grants that power to him. It runs only to Congress.

The Court in the *Prize Cases* said:

> "By the Constitution, Congress alone has the power to declare a national or foreign war. . . . The Constitution confers on the President the whole Executive power. . . . He has no power to initiate or declare a war either against a foreign nation or a domestic State. . . .
>
> "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without

waiting for any special legislative authority." 67 U. S. 635, 668.

The question of justiciability does not seem substantial. In the *Prize Cases*, decided in 1863, the Court entertained a complaint raising the constitutionality of the Civil War. In my time we held that Truman in the undeclared Korean War (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579) had no power to seize the steel mills in order to increase war production. The *Prize Cases* and the *Youngstown* case involved the seizure of property. But the Government conceded on oral argument that property is no more important than life under our Constitution. Our Fifth Amendment which curtails federal power under the Due Process Clause protects "life, liberty, and property" in that order. Property is important, but if Truman could not seize it in violation of the Constitution I do not see how any President can take "life" in violation of the Constitution.

As to "standing," which my Brother MARSHALL correctly states is an issue, there seems to be no substantial question that a taxpayer at one time had no standing to complain of the lawless actions of his Government. But that rule has been modified. In *Flast* v. *Cohen*, 392 U. S. 83, 106, the Court held that a taxpayer could invoke "federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." That case involved alleged violations of the Establishment Clause of the First Amendment. The present case involves Art. I, § 8, which gives Congress and not the President the power to "declare War."

If petitioners are correct on the merits they have standing as taxpayers. The case in that posture is in the class of those where standing and the merits are inextricably intertwined. I see no difference constitutionally speaking between the standing in *Flast* and the

standing in the present case for our Cambodian caper contested as an unconstitutional exercise of presidential power.

When a stay in a capital case is before us, we do not rule on guilt or innocence. A decision on the merits follows and does not precede the stay. If there is doubt whether due process has been followed in the procedures, the stay is granted because death is irrevocable. By the same token I do not sit today to determine whether the bombing of Cambodia is constitutional. Some say it is merely an extension of the "war" in Vietnam, a "war" which the Second Circuit has held in *Berk* v. *Laird*, 429 F. 2d 302, to raise a "political" question, not a justiciable one. I have had serious doubts about the correctness of that decision, but our Court has never passed on the question authoritatively. I have expressed my doubts on the merits in various opinions dissenting from denial of certiorari.* But if the "war" in Vietnam were assumed to be a constitutional one, the Cambodian bombing is quite a different affair. Certainly Congress did not in terms declare war against Cambodia and there is no one so reckless to say that the Cambodian forces are an imminent and perilous threat to our shores. The briefs are replete with references to recent acts of Congress which, to avoid a presidential veto, were passed to make clear—as I read them—that no bombing of Cambodia was to be financed by appropriated funds after August 15, 1973. Arguably that is quite different from saying that Congress has declared war on Cambodia for a limited purpose and only up to and not beyond August 15, 1973. If the acts in question are so construed the result would be, as the District Court said, that the number of votes

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**Sarnoff* v. *Schultz*, 409 U. S. 929; *DaCosta* v. *Laird*, 405 U. S. 979; *Massachusetts* v. *Laird*, 400 U. S. 886; *McArthur* v. *Clifford*, 393 U. S. 1002; *Hart* v. *United States*, 391 U. S. 956; *Holmes* v. *United States*, 391 U. S. 936; *Mora* v. *McNamara*, 389 U. S. 934, 935; *Mitchell* v. *United States*, 386 U. S. 972.

needed to sustain a presidential veto—one-third plus one—would be all that was needed to bring into operation the new and awesome power of a President to declare war. The merits of the present controversy are therefore, to say the least, substantial, since denial of the application before me would catapult our airmen as well as Cambodian peasants into the death zone. I do what I think any judge would do in a capital case—vacate the stay entered by the Court of Appeals.

It is so ordered.

Justice Marshall's Opinion Granting Stay

SUPREME COURT OF THE UNITED STATES

No. A-175

James R. Schlesinger.
v.
Elizabeth Holtzman et al.

On Application to Stay.

[August 4, 1973]

MR. JUSTICE MARSHALL, Circuit Justice.

On August 1, 1973, I, as Circuit Justice for the Second Circuit, denied an application to vacate a stay entered by the United States Court of Appeals for the Second Circuit on July 27, 1973, staying the order of the District Court for the Eastern District of New York dated July 25, 1973.

On August 2, Elizabeth Holtzman and others, plaintiffs in the original action, presented an application to MR. JUSTICE DOUGLAS. A hearing was then set in Yakima, Washington, on Friday, August 3. On August 4 an order and opinion were issued by MR. JUSTICE DOUGLAS vacating the stay entered by the Court of Appeals on July 27, 1973, and thereby reinstating the order of the United States District Court for the Eastern District of New York.

On the same day, August 4, the Solicitor General presented an application for a stay of the order of the United States District Court for the Eastern District of New York.

Since the action of the Court of Appeals in granting a stay is set aside, the only order extant in this case is the order of the District Court dated July 25, 1973. The instant application calls on me to deal directly with that order of the District Court.

In the ordinary course, a Justice acting as a Circuit Justice would defer acting with respect to a District Court order until the Court of Appeals had acted, but in the present circumstances the Court of Appeals has already acted and the consequence of the order of Mr. JUSTICE DOUGLAS is to set aside the Court of Appeals order.

The consequence of the Court of Appeals stay order of August 1, 1973, was to preserve the status quo until it could act on the merits. The Court of Appeals, having originally expedited a hearing on the merits to August 13, 1973, has since further expedited the hearing on the merits to August 8, 1973.

Now therefore, the order of the District Court dated July 25, 1973, is hereby stayed pending further order by this Court.

I have been in communication with the other Members of the Court, and THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST agree with this action.

Justice Douglas' Dissenting Opinion

SUPREME COURT OF THE UNITED STATES

No. A-175

James R. Schlesinger.
v.
Elizabeth Holtzman et al.

On Application to Stay.

[August 4, 1973]

MR. JUSTICE DOUGLAS, dissenting.

The stay I entered August 3, 1973, in *Holtzman* v. *Schlesinger* not only vacated the stay of the Court of Appeals but also reinstated the judgment of the District Court. I mailed it on August 3, 1973, and reported its contents to the Clerk's office. My order of August 3, 1973, reads as follows:

"ORDER

"On application of petitioners and after oral argument it is ordered:

"(1) that the stay of the District Court's order entered by the Court of Appeals on July 27, 1973 is vacated and

"(2) that the order of the District Court of July 25, 1973 enjoining Defendants from participating in any way in military activities in or over Cambodia or releasing any bombs which may fall on Cambodia is hereby restored.

W. O. Douglas

August 3, 1973."

My Brother MARSHALL in his opinion of August 4, 1973, misstates the facts when he says that "the only order extant in this case is the order of the District Court." A correct statement would be that the most recent order in this case was my order of August 3, 1973, reinstating the order of the District Court, which would thus leave

the Court of Appeals free to act on the merits and give full relief or, alternatively, permit this Court to reverse me. Under my Brother MARSHALL's order of August 4, 1973, only this Court can act to give injunctive relief.[1]

The Court has unquestioned power to reverse me; and although I disagree with the Court's action on the merits, that is not the point of this dissent. If we who impose law and order are ourselves to be bound by law and order, we can act as a Court only when at least six of us are present. That is the requirement of the Act of Congress;[2] and heretofore it has been the practice to summon the Court to Special Term. Seriatim telephone calls cannot, with all respect, be a lawful substitute. A Conference brings us all together; views are exchanged; briefs are studied; oral argument by counsel for each side is customarily required. But even without participation the Court always acts in Conference and therefore responsibly.

Those of the Brethren out of Washington, D. C., on August 4, 1973, could not possibly have studied my opinion in this case. For although I wrote it late on August 3, it was not released until 9:30 a. m. on the 4th and before 3 p. m. the 4th I was advised by telephone that eight Members of the Court disagreed with me. The issue tendered in the case was not frivolous; the Government on oral argument conceded as much. It involved a new point of law never yet resolved by the Court. I have participated for enough years in Conferences to realize that profound changes are made among the Brethren once their minds are allowed to explore a

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[1] The Court takes a bite out of the merits, for the order of August 4, 1973, bars the Court of Appeals from reinstating the judgment of the District Court until and unless this Court acts, as the order states that the order of the District Court "is hereby stayed pending further order by this Court."

[2] "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum." 28 U. S. C. § 1.

problem in depth. Yet there were only a few of the Brethren who saw my opinion before they took contrary action.

Whatever may be said on the merits, I am firmly convinced that the telephonic disposition of this grave and crucial constitutional issue is not permissible. I do not speak of social propriety. It is a matter of law and order involving high principles. The principles are that the Court is a deliberative body that acts only on reasoned bases after full consideration, and that it is as much bound by the law of the land as is he who lives in the ghetto or in the big white house on the hill. With all respect I think the Court has slighted that law. The shortcut it has taken today surely flouts an Act of Congress providing for a necessary quorum. A Gallup Poll type of inquiry of widely scattered Justices is, I think, a subversion of the regime under which I thought we lived.

One Justice who grants bail, issues a stay of a mandate, or issues a certificate of probable cause cannot under the statutory regime designed by Congress vacate, modify, or reverse what another Justice does.[1] The Court of course can do so—and only the Court [2]—but when the Court acts it must have six Members present.

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[1] The statutes authorizing individual Justices of this Court to affirmatively grant applications for such actions do not authorize them to rescind affirmative action taken by another Justice. See, *e. g.*, 28 U. S. C. § 2101 (f) (stays of mandate); 28 U. S. C. § 2241 (a) (writs of habeas corpus); 18 U. S. C. § 3141 and Fed. Rule Crim. Proc. 46 (a)(2) (granting of bail).

[2] This requirement of collegial action is confirmed by the Rules of this Court and by this Court's prior decisions and practices.

Rules 50 and 51 govern the in chambers practices of the Court. Rule 50 (5) provides that, when one Justice denies an application made to him, the party who has made the unsuccessful application may renew it to any other Justice. It was pursuant to this Rule that application for the stay in this case was made to me. But neither Rule 50 nor Rule 51 authorizes a party, once a stay has been granted, to contest that action before another individual Justice.

The Court has previously deemed it necessary and proper to meet

Under the law as it is written the order of MR. JUSTICE MARSHALL on August 4, 1973, will in time be reversed by that Higher Court which invariably sits in judgment on the decisions of this Court. The order of August 4, 1973, in this case would be valid only if we had the power to agree by telephone that the rules framed by Congress to

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together in Special Term before stays granted by an individual Justice out of Term could be overturned. In *Rosenberg* v. *United States*, 346 U. S. 273, the full Court felt constrained to consider its power to vacate a stay issued by an individual Justice, finally resting that power on the Court's position—as a body—as final interpreter of the law:

"We turn next to a consideration of our power to decide, in this proceeding, the question preserved by the stay. It is true that the full Court has made no practice of vacating stays issued by single Justices, although it has entertained motions for such relief. But reference to this practice does not prove the nonexistence of the power; it only demonstrates that the circumstances must be unusual before the Court, in its discretion, will exercise its power.

"The power which we exercise in this case derives from this Court's role as the final forum to render the ultimate answer to the question which was preserved by the stay.

. . . . . .

". . . [T]he reasons for refusing, as a matter of practice, to vacate stays issued by single Justices are obvious enough. Ordinarily the stays of individual Justices should stand until the grounds upon which they have issued can be reviewed through regular appellate processes.

"In this case, however, we deemed it proper and necessary to convene the Court to consider the Attorney General's urgent application." 346 U. S., at 286–287 (footnote omitted).

Finally, it is our procedure during a Term of Court to take an application that has already been denied or acted upon by one of the Justices to the entire Court upon an application made by the opposing side, so that the entire Court can act and thus prevent "shopping around." That course is not possible during recess when the Justices are scattered around the country and throughout the world. Therefore it has been my practice if I grant a stay during recess to make that stay effective only until the Court convenes in October. This course could not be followed in the instant case because after August 15, 1973, the case will be moot.

govern our procedures should be altered. We have no such power. What Members of the Court told Brother MARSHALL to do on August 4, 1973, does not, with all respect, conform with our ground rules. It may have been done inadvertently, but it is nonetheless not a lawful order. Therefore, I respectfully dissent.

Denial of Application for Extraordinary Sitting

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON D. C. 20543

August 10, 1973

Burt Neuborne, Esq.
American Civil Liberties Union
22 East 40th Street
New York, N Y. 10016

RE: Elizabeth Holtzman, etc., et al.
v. James R. Schlesinger, etc.,
et al., A-187

Dear Mr. Neuborne:

Your application for an extraordinary sitting of the Supreme Court in the above-captioned cause was presented to the Chief Justice, and it was denied by him on August 9, 1973 with the following endorsement thereon:

"Denied.
S/ W.E.B.
8/9/73."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Arthur G. Christean

Arthur G. Christean
Deputy Clerk

jmh

cc: The Honorable Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Justice Burger's Order Denying Extraordinary Sitting

SUPREME COURT OF THE UNITED STATES

No. A-187

ELIZABETH HOLTZMAN, etc., *et al.*,

Petitioners,

—v.—

JAMES R. SCHLESINGER, etc., *et al.*

ORDER

Petitioners' application, by counsel, for an extraordinary sitting of the Supreme Court of the United States having been filed on August 10, 1973, and having been considered,

NOW THEREFORE, IT IS ORDERED that the application be, and it is hereby, denied.

WARREN E. BURGER
Chief Justice of the United States

Dated this 13th
day of August, 1973.

Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73-C-537

ELIZABETH HOLTZMAN, individually and in her capacity as a member of the United States House of Representatives; 1st LT. ARTHUR WATSON, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN MICHAEL FLUGGER, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN JAMES H. STRAIN, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; and CAPTAIN DONALD E. DAWSON, 307th Strategic Wing, United States Air Force, U-Tapo, Thailand,

Plaintiffs,

—against—

JAMES R. SCHLESINGER, individually and as Secretary of Defense; JOHN L. McLUCAS, individually and as Acting Secretary of the Air Force; and WILLIAM P. CLEMENTS, individually and as Deputy Secretary of Defense,

Defendants.

Plaintiffs having moved for summary judgment and declaratory and injunctive relief, and the court having received the papers submitted by both parties and having heard argument and having issued a Memorandum containing a statement of facts and a discussion of the applicable law, and due deliberation having been had, and the court having determined that no bond is required of the plaintiffs; it is

ORDERED, ADJUDGED and DECLARED, that there is no existing Congressional authority to order military forces into combat in Cambodia or to release bombs over Cambodia, and that military activities in Cambodia by American armed forces are unauthorized and unlawful; and it is

ORDERED, ADJUDGED and DECREED, that defendants James S. Schlesinger as Secretary of Defense, John L. McLucas as Acting Secretary of the Air Force, and William P. Clements, as Deputy Secretary of Defense, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this judgment, are permanently enjoined and restrained from participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia; and it is

ORDERED, that the effective date of the foregoing injunction shall be postponed until 4:00 o'clock in the afternoon, Eastern Daylight Savings Time, on Friday, July 27, 1973, in order that defendants may have an opportunity if so advised to apply to the Court of Appeals for a stay pending appeal.

Dated: Brooklyn, New York
July 25, 1973

ORRIN G. JUDD
United States District Judge

SUPREME COURT, U. S.
FILED
FEB 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-941

ELIZABETH HOLTZMAN, individually and in her capacity as a member of the United States House of Representatives; 1st LT. ARTHUR WATSON, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN JAMES H. STRAIN, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; CAPTAIN MICHAEL FLUGGER, 43rd Strategic Wing, United States Air Force, Anderson Air Force Base, Guam; and CAPTAIN DONALD DAWSON, 307th Strategic Wing, United States Air Force, U-Tapao, Thailand,

Petitioners,

—against—

JAMES R. SCHLESINGER, individually and as Secretary of Defense; JOHN L. MCLUCAS, individually and as Secretary of the Air Force; and WILLIAM P. CLEMENTS, individually and as Deputy Secretary of Defense,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

BURT NEUBORNE
LEON FRIEDMAN
MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Petitioners

IN THE

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Petitioners,

—against—

JAMES R. SCHLESINGER, individually and as Secretary of Defense; JOHN L. MCLUCAS, individually and as Secretary of the Air Force; and WILLIAM P. CLEMENTS, individually and as Deputy Secretary of Defense,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioners, pursuant to Rule 24(5), respectfully submit the within Supplemental Brief to invite the Court's attention to new matter not available at the time of the last filing.

I.

Counsel are pleased to inform the Court that the Secretary of the Air Force has directed that Captain Donald Dawson be granted an honorable discharge as a conscientious objector. Accordingly, counsel anticipate that court martial charges arising out of Captain Dawson's refusal to bomb Cambodia will be withdrawn in the immediate future.

II.

Unfortunately, however, respondents have persisted in imposing punitive disabilities upon Captain Michael Flugger and Captain James Strain, solely because they sought judicial review of the legality of orders directing them to bomb Cambodia.

As a penalty for having sought judicial review of the legality of orders directing them to bomb Cambodia, both Captain Flugger and Captain Strain have been permanently grounded. (Copies of respondents' orders permanently grounding Captain Flugger and Captain Strain are reproduced as a Supplemental Appendix.)

Unlike Captain Dawson, neither Captain Flugger nor Captain Strain ever disobeyed, or threatened to disobey, a miltary order. Indeed, throughout these proceedings, Captain Flugger and Captain Strain have made it clear that they were prepared to execute all orders directed to them, reserving only the right to seek judicial review of their legality.[1] Respondents have reacted to petitioners'

[1] Counsel regret inadvertent language in the Petition for Certiorari which may have implied that Captain Flugger, Captain Strain or Lt. Watson disobeyed, or threatened to disobey, a military order. Their consistent preparedness to carry out orders directed to them has never been questioned.

lawful and orderly attempt to test the legality of their Cambodian bombing orders by destroying petitioners' military careers and by imposing serious economic sanctions upon them.[2] In imposing sanctions upon Captain Flugger and Captain Strain by permanently grounding them under the Air Force's "Human Reliability Program," merely because they exercised their rights as Americans to seek access to the courts, respondents are in clear violation of repeated rulings of this Court which condemn attempts to punish individuals for seeking judicial review. E.g. *United States* v. *Jackson*, 390 U.S. 581 (1968); *Pearce* v. *North Carolina*, 395 U.S. 711 (1969). Do respondents seriously believe that the only "reliable" American pilots are those who will unthinkingly execute a military command with no concern for its legality?

The imposition of so drastic a set of collateral consequences upon Captain Flugger and Captain Strain, not only violates their constitutional rights, but precludes any assertion that this matter is moot.

Respectfully submitted,

BURT NEUBORNE
LEON FRIEDMAN
MELVIN L. WULF
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Petitioners

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[2] By permanently grounding Captain Flugger and Captain Strain, respondents have reduced them to the anomalous position of Air Force pilots who are not permitted to fly, and have reduced their salaries by approximately $165 per month.

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

[Copies of Air Force Orders Permanently Grounding Captains Flugger and Strain]

DEPARTMENT OF THE AIR FORCE
Headquarters 99th Combat Support Group (SAC)
Westover Air Force Base, Massachusetts 01022

Aeronautical Order 31 January 1974
AO-2

Captain James H. Strain, 443-40-4917, 99 Bomb Wg, (SAC), this stn, is suspended from flying status effective 31 January. Reason for suspension: Permanent disqualified under Human Reliability Program (AFM 35-99). Flying status code is changed to 2D. Authority: AFM 35-13, paragraph 2-29e(6) and Msg Hq 2AF/DP 311901Z, Jan 74.

For the Commander
(Official Seal)

Robert P. Negri, Major, USAF
Chief, Central Base Administration

Distribution
2-Hq SAC/DPACF, Offutt AFB NE 68113
2-2AF/DPA, Barksdale AFB LA 71110
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1-AFMPC/DPMDRR, Randolph AFB TX 78148
2-SGP
4-Indiv Concerned
4-99CSG/DPMQS
4-99CSG/ACFF2

(Emblem)

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS SECOND AIR FORCE (SAC)
BARKSDALE AIR FORCE BASE, LOUISIANA 71110

REPLY TO
ATTN OF: CC 31 JAN 1974

SUBJECT: Permanent HRP Disqualification on Captain James H. Strain III

TO: 99 BMW/CC
99 CSG/DPM
IN TURN

1. Captain James H. Strain III, 443-40-4917 FV, is permanently disqualified from the Human Reliability Program effective this date.

2. This disqualification is based on Captain Strain's actions and demonstrated beliefs which are inconsistent with his utilization in human reliability certified duties.

3. Insure that all actions outlined in paragraph 1-27b, Air Force Manual 35-99, and paragraph 2-29e(6), Air Force Manual 35-13, are complied with, and that AFMPC/DPMROC1, AFMPC/DPMROC4, CINCSAC/DPAAB, and Second Air Force DPA are informed of all actions taken as a result of this permanent disqualification.

/s/ R. M. HOBAN
R. M. Hoban, Lt Gen, USAF
Commander

Cy to: AFMPC/DPMROC1
AFMPC/DPMROC4
CINCSAC/DPAAB

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 99TH COMBAT SUPPORT GROUP (SAC)
WESTOVER AIR FORCE BASE, MASSACHUSETTS 01022

AERONAUTICAL ORDER
AO-62

15 November 1973

CAPT MICHAEL E. FLUGGER, 107-34-7761, 346 Bomb Sq, (SAC), this stn, is suspended from flying status eff 3 October 1973. Reason for Suspension: Permanent disqualified under Human Reliability Program (AFM 35-99). Verbal order of the Commander on 3 Oct. 73 is confirmed, exigencies of the services precluded written orders in advance. Flying status code is changed to 2D. Auth: AFM 35-13, para 2-29e (6).

FOR THE COMMANDER
(Official Seal)

ROBERT P. NEGRI, Major, USAF
Chief, Central Base Administration

DISTRIBUTION:
2-SAC/DPACF, Offutt AFB NE 68113
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4-Indiv Concerned
4-99CSG/ACFF-2

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MAR 20
MICHAEL RODAK, JR.

No. 73-941

In the Supreme Court of the United States

OCTOBER TERM, 1973

ELIZABETH HOLTZMAN, ET AL., PETITIONERS

v.

JAMES R. SCHLESINGER, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-941

ELIZABETH HOLTZMAN, ET AL., PETITIONERS

v.

JAMES R. SCHLESINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, a Congresswoman and present and former Air Force officers, instituted this suit for declaratory and injunctive relief, alleging American involvement in combat hostilities in Cambodia to be unconstitutional. The district court granted petitioners' motion for summary judgment and enjoined the respondents from participating in any hostilities in Cambodia.[1] On an expedited appeal from the district court's decision, the court of appeals reversed on the ground that the case presented a non-justiciable political question.[2]

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[1] 361 F. Supp. 553. The district court's order was ultimately stayed by Mr. Justice Marshall acting as Circuit Justice with the agreement of seven other members of this Court. Mr. Justice Douglas dissented. See 414 U.S. 1321. (Marshall, J., Circuit Justice); see also 414 U.S. 1304 (Marshall, J., Circuit Justice); 414 U.S. 1316 (Douglas, J., Circuit Justice).

[2] Pet. App. 1a-25a 484 F. 2d 1307, rehearing denied, September 17, 1973 (Pet. App. 26a-27a).

1. This suit was brought prior to the termination of American combat activities in Cambodia on August 14, 1973.[3] The cessation of American combat activity in Cambodia on that date plainly moots the case. The controversy has been put to rest by the joint action of the other branches of government. Without this "immediacy or reality", there is no jurisdiction or need for review in this Court.[4] *Golden* v. *Zwickler*, 394 U.S. 103.

2. In any event the question presented here is essentially the same one which has been before this Court numerous times: whether United States' participation in Southeast Asia is unconstitutional because it had not been properly authorized by Congress. For the reasons stated on pp. 17-42 of our Brief for the Defendants opposing the Motion for Leave to File Complaint in *Commonwealth of Massachusetts* v. *Laird*, No. 42 Original, October Term, 1970, motion denied, 400 U.S. 886, we submit that this is a nonjusticiable political question which is neither susceptible to judicial determination nor judicial relief. See *Baker* v. *Carr*, 369 U.S. 186; *Powell* v. *McCormack*, 395 U.S. 486. Moreover this question has now received a political solution, in that, following the enactment of P.L. 93-

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[3]See August 15, 1973 Statement by the Deputy White House Press Secretary: Termination of U.S. Combat Activity in Cambodia, 9 Weekly Compilation of Presidential Documents 984.

[4]Petitioners' allegation that Captain Dawson might face a court martial in which the legality of his orders to bomb Cambodia may be at issue (Pet. p. 5, n. 2; p. 21) has been mooted by his honorable discharge (the Brief for Petitioners, p. 2). Nor does the grounding of two of petitioners make the questions of legality presented by the petition any less moot.

52, 87 Stat. 130 on July 1, 1973,[5] American combat activity in Cambodia was terminated. Cf. *Drinan* v. *Nixon*, No. 73-1271, August 10, 1973 (C.A. 1), affirming 364 F. Supp. 853 (D. Mass.).

Furthermore, the court below recognized that in order to reach the issue raised by plaintiffs, a court must first make a determination that continued military participation in Cambodia after the withdrawal of American troops from Vietnam represents a "basic change" in the situation of a type that would require an independent showing of congressional authority. The court correctly concluded that this preliminary determination itself involved a non-justiciable political question because it required information as well as military and diplomatic expertise far beyond the judicial domain (Pet. App. 6a-12a). Thus, this case presents political questions at two levels of analysis and, therefore, is even less appropriate for judicial intervention than

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[5]P.L. 93-52, 87 Stat. 134, provides in part:

> Sec. 108.
>
> Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

the cases which dealt primarily with the conflict in Vietnam.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[6]See, *e.g.*, *Massachusetts* v. *Laird*, *supra*; *Atlee* v. *Laird*, 347 F. Supp. 689 (E.D. Pa.), affirmed, 411 U.S. 911; *Sarnoff* v. *Connally*, 457 F. 2d 809 (C.A. 9), certiorari denied, 409 U.S. 929; *DaCosta* v. *Laird*, 448 F. 2d 1368 (C.A. 2), certiorari denied, 405 U.S. 979; *Orlando* v. *Laird*, 443 F. 2d 1039 (C.A. 2), certiorari denied, 404 U.S. 869; *Berk* v. *Laird*, 429 F. 2d 302 (C.A. 2), certiorari denied, 404 U.S. 869; *Simmons* v. *United States*, 406 F. 2d 456 (C.A. 5), certiorari denied, 395 U.S. 982; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A.D.C.), certiorari denied, 389 U.S. 934; *Luftig* v. *McNamara*, 373 F. 2d 664 (C.A.D.C.), certiorari denied, 387 U.S. 945; *Massachusetts* v. *Laird*, 451 F. 2d 26 (C.A. 1). The courts declined to reach the merits of the controversy in each of the above cases involving the issue whether the proper distribution of war-making powers raised a political question. Courts have also recognized as other bases for dismissing such actions that the plaintiff lacked standing, see *e.g.*, *Ashton* v. *United States*, 404 F. 2d 95 (C.A. 8), ceritorari denied, 394 U.S. 960; *Kalish* v. *United States*, 411 F. 2d 606 (C.A. 9), certiorari denied, 396 U.S. 835; *Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1042, or that the suit was an unconsented suit against the government, see, *e.g.*, *Velvel* v. *Nixon*, *supra*; *Luftig* v. *McNamara*, *supra*.